



# **Failing the Bay:**

## **Clean Water Act Enforcement in Maryland Falling Short**

**A Report Commissioned by The Abell Foundation**

**By Robert L. Glicksman and Yee Huang**

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### Acknowledgements

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## Executive Summary

In 1972, Congress adopted the modern Clean Water Act (CWA), establishing federal, uniform standards for protecting the nation's waterways. The law established a process for limiting polluting emissions, under which state and federal environmental agencies grant permits to polluters based on local waterways' uses and pollution loads. Just as important, the law created a mechanism for federal and state enforcement of those permits.

Significantly, the CWA allows the U.S. Environmental Protection Agency (EPA) to delegate permitting and enforcement to state environmental agencies, and by virtue of such delegation, the Maryland Department of the Environment (MDE) enforces federal water pollution standards in the state. This report evaluates MDE's enforcement of the CWA and offers solutions to improve and reinvigorate the program. Those conclusions and recommendations are based on research that draws on publicly available information, including MDE's Annual Enforcement and Compliance Reports; a review of scholarly research on effective enforcement program design; and a series of interviews conducted with stakeholders across the state and a meeting with MDE enforcement staff.

## Findings

The report draws three significant conclusions:

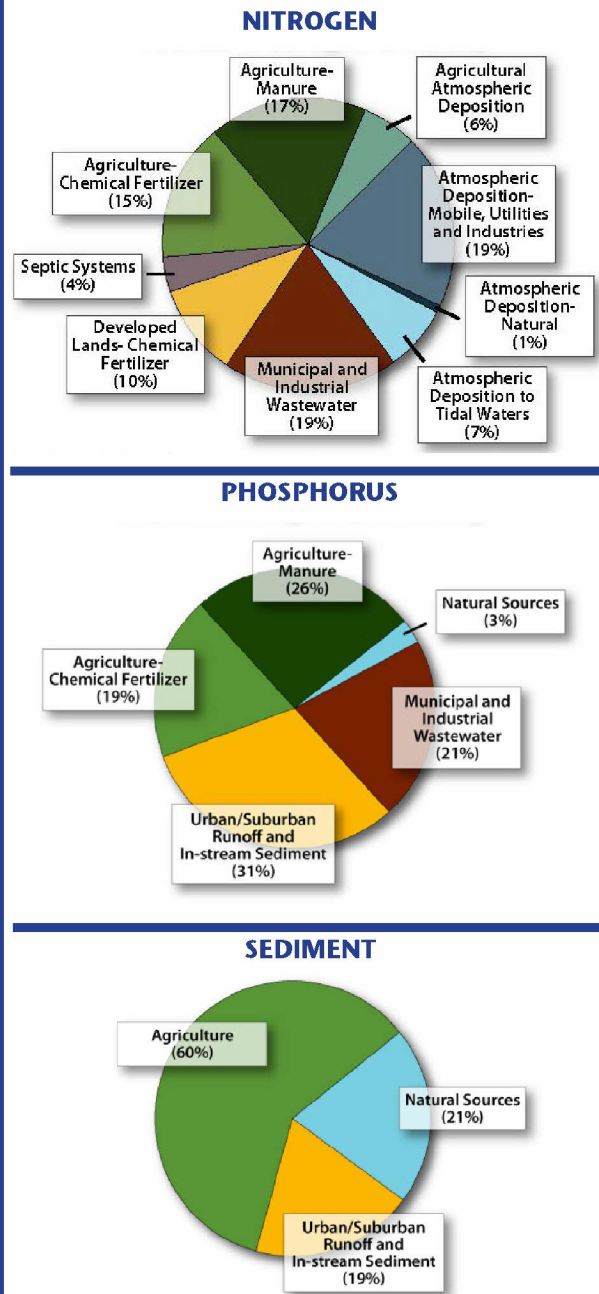
1. **Funding.** MDE is drastically underfunded. For example, the overall workforce budget for the Water Management Administration (WMA) between 2000 and 2009 declined from \$3.39 million to \$3.16 million. When adjusted for inflation, this decline is nearly 25 percent and coincides with a doubling of permits-in-effect. As a result, the agency does not have enough resources to effectively fulfill the core mission of the CWA and state water quality laws. The funding shortages are especially pronounced with respect to the enforcement workforce and the number of inspections. The total number of WMA inspector positions, including both filled and vacant positions, has decreased by 12 percent, while the number of active, full-time inspectors has decreased by 25 percent. Each inspector in the WMA is responsible for 1,184 permits as of 2009, triple the number of permits per inspector in 2000. Funding shortages also dramatically curtail the ability of MDE's legal counsel to pursue and effectively litigate enforcement actions. Nearly 40 percent of MDE's referrals for legal action from 2009—325 of 816 cases—are still awaiting action by the Office of the Maryland Attorney General (OAG). While these attorneys report to the Attorney General, their positions are located within MDE's budget.
2. **Program Design.** Regardless of funding shortfalls, MDE has not designed its enforcement program to effectively deter dischargers from violating the CWA and state water quality laws. MDE relies primarily on paper reviews of Discharge Monitoring Reports (DMRs) to assess compliance, overlooking the importance of physical, onsite inspections that may reveal violations or problems not disclosed in such reports. Across the board, MDE has settled for strikingly low penalties, and its

penalty policy fails to recover the violator's economic benefit from noncompliance. Between 2000 and 2009, the average penalty that the WMA obtained per enforcement action for all its water permitting programs is approximately \$1,260, around 5 percent of the maximum penalty per day authorized under the CWA, as enacted, and 12.6 percent of the maximum penalty authorized per day under Maryland law. MDE also fails to fully disclose the range of enforcement actions taken by local programs with delegated enforcement authority, resulting in an incomplete picture of enforcement activities across the state.

3. **Citizen Suits.** MDE fails to take advantage of citizen suits to supplement its own enforcement actions and to maximize its limited resources. MDE's institutional mentality precludes citizen suits from proceeding by preempting these lawsuits and denying citizens the opportunity to participate or to represent their own interests once MDE takes over the case. According to some environmental interviewees and officials, this attitude toward citizen suits has provoked an atmosphere of tension and controversy among MDE staff and the regulated community, as they question the validity of this supplementary enforcement tool provided by Congress to give citizens access to the courts and to assist state enforcement programs.

Ultimately, because MDE is starved for resources and has persisted in carrying out an inadequately designed program, its CWA enforcement program is ineffective at deterring noncompliance across the spectrum of regulated sectors. In fact, funding gaps have persisted for so long that, according to many we interviewed, MDE's staff has internalized an unacceptably low level of expectations for the agency's performance in enforcement. For example, MDE relies primarily on paper inspections of self-monitoring reports to determine compliance. Few, if any, credible experts in the operation of a deterrence-based enforcement program, whether in the government, the private sector, or among publicly-funded organizations, would agree that paper inspections provide the foundation for an effective enforcement program. Another example is the backlog of case referrals awaiting assignment in the OAG, indicating that even MDE's weak efforts to verify compliance and implement an effective deterrence-based enforcement program are crippled by lack of legal representation.

**FIGURE 1: Pollution Contribution to the Bay by Sector**





### Stakeholder Interviews

As part of their research for this report, the authors conducted a series of interviews with key stakeholders with varied and considerable experience in CWA enforcement to determine how they perceive MDE's enforcement program and to help identify the program's strengths, weaknesses, and gaps in enforcement. The authors requested interviews with 20 stakeholders, who together represent a diverse group of current and former federal, state, and local government officials; members of the regulated community; and members of public interest groups. The findings are drawn from interviews with the 16 stakeholders who agreed to participate.

In general terms, interviewees reached a consensus on the resource limitations that plague MDE's enforcement program and the OAG's ability to pursue cases referred to it by MDE. They also agreed generally that criminal enforcement could be increased for particularly willful and egregious violations when a criminal law is clearly violated. Interviewees disagreed on many other issues, however, including the institutional and permitting aspects of MDE's enforcement program, the nature of MDE's enforcement approach and actions, the role and effectiveness of citizen suits in enforcement, and the role of EPA.

Themes emerging from the interviews included:

- **Evaluations of MDE's enforcement program revealed it was weak for four reasons:** resource limitations on enforcement; institutional limitations on enforcement; weaknesses in the permitting program; and the nature of enforcement actions taken by MDE.
- **Nearly all interviewees lamented the lack of financial resources available to MDE and appreciated the challenge faced by MDE staff being asked to do more with less money.** One industry interviewee pointed out a basic dilemma: Maryland "can't keep diverting resources and adding more statutory requirements and expect things to improve."
- **All interviewees agreed that MDE should be the primary enforcer for violations of Clean Water Act requirements in Maryland** with citizen suits and EPA taking a secondary role, if any.
- **Nearly all interviewees expressed dismay at the lack of inspectors and the lack of inspections in MDE's enforcement program and cited a need to increase both.** At least two industry interviewees suggested MDE should hire more inspectors to catch such errors and to identify specific violations, rather than relying on enforcement efforts that overreach because MDE lacks the inspectors to review each entity.
- **Some officials and environmental interviewees lamented the low penalties assessed by MDE and their negligible impact on deterrence.**
- **Interviewees expressed divergent views on the role of citizen suits in enforcement.** All environmental interviewees and some officials expressed the view that citizen suits are a critical tool in enforcing the law and that they help drive MDE's

enforcement. They favored a larger role for citizen suits as a supplement to MDE's work and to leverage resources and characterized MDE's attitude toward citizen suits as unfavorable, if not outright hostile. Interviewees attributed this attitude to insecurity, embarrassment, and favoritism toward the regulated community. Industry interviewees and some officials, on the other hand, were less approving of citizen suits, characterizing them as "witch hunts" and finding that the suits impact the timing of MDE enforcement, but not the outcome of that enforcement.

- **Industry interviewees characterized MDE's enforcement as heavy-handed, inconsistent, and disproportionate.** In their opinion, most violations occur because the regulated community is unaware or ignorant of the regulations. They said that MDE should provide more education and outreach and rely on more cooperative actions to reduce violations.
- **Interviewees had different and contrasting opinions on MDE's relationships with the regulated community and with public interest groups and their impacts on enforcement. Both industry and environmental interviewees expressed suspicion that MDE favors the other side.** Both environmental and industry interviewees recommended a more inclusive decision-making process.
- **Nearly every interviewee thought that MDE and the OAG should pursue criminal enforcement actions for willful or flagrant violations.** Opinions as to the effectiveness of criminal enforcement actions in achieving deterrence varied. Some interviewees said that more criminal actions would send a clear message. Others had difficulty evaluating the deterrent effect when cases are so difficult to establish and civil penalties are much higher than they are in criminal cases.
- **Environmental interviewees and some officials attributed some enforcement problems to the OAG, citing a lack of resources.** Some interviewees cited the need for greater OAG review of permits before they are issued.

## Key Recommendations

This report concludes that while Maryland has tough environmental laws, MDE lacks the funding and does not currently have an adequate enforcement program to achieve the goals set under the CWA and its own state laws. However, even without additional funding, it could redesign its existing program and reallocate its limited resources to improve enforcement of water quality laws. The authors offer the following recommendations:

■ **Increase Funding.** Drastically underfunded, MDE does not have enough resources to effectively fulfill the core mission of the CWA and state water quality laws. The funding shortages are especially pronounced with respect to the enforcement workforce, which limits how many inspections the agency is able to conduct. Both the regulated community and environmental groups agree that MDE is overwhelmed with work and has limited resources available to effectively enforce the law; they also agree that more inspectors are necessary to develop a steady, judicious, systematic, and fair enforcement program. Going forward:



- The Maryland General Assembly should provide additional funding to ensure a vigorous enforcement program and should index increased funding levels to the rate of inflation.
- The Maryland General Assembly should authorize an increase in permitting fees to ensure that the fees cover the basic cost of program administration.
- The Maryland General Assembly should authorize increased penalties for violations and should establish mandatory minimum penalties that are not subject to MDE discretion.

■ **Revise Program Design.** Regardless of funding shortfalls, MDE has not designed its enforcement program to effectively deter dischargers from violating the CWA and state water quality laws. Going forward:

- In its penalty structure, MDE should seek to recoup the economic benefit achieved by noncompliance from all defendants in enforcement actions.
- MDE should stop relying primarily on paper reviews of permit-holders' DMRs to set enforcement priorities and should increase the frequency of physical, on-site inspections.
- MDE should reevaluate the balance of judicial enforcement actions and administrative enforcement actions and carefully consider which route is better, based on factors such as the difference in maximum available penalties or past experience with similar cases or in similar venues.
- MDE should conduct an analysis of the most significant causes of Bay pollution and select and inspect on an annual basis the largest dischargers or a random sample of discharges in sectors with multiple small dischargers.

■ **Embrace Citizen Suits.** MDE fails to take advantage of citizen suits to supplement its own enforcement actions and to maximize its limited resources. MDE often blocks citizen suits by initiating enforcement action that preempts these lawsuits, and denies citizens the opportunity to participate or to represent their own interests once MDE takes over the case.

- On a case-by-case basis, MDE should permit citizen suits to proceed in federal court to supplement its own enforcement. Allowing enforcement actions to proceed in federal courts would facilitate maximum penalty recovery and thus create maximum deterrent effect.

## Conclusion

The cost of MDE's enforcement failures is very high for Marylanders, not just because the Chesapeake Bay is so much a part of the state's identity or because it is so widely used for recreation, but because it is central to the health of the state's economy. Maryland is not the only the state that pollutes the Bay, of course, and it is not the only jurisdiction that enforces water quality standards affecting the Bay. But in order to achieve the goal of restoring the health of the Bay, Maryland must do its part. MDE must forcefully and publicly renew its commitment to enforcement.

## Project Goals and Methodology

In December 2009, The Abell Foundation commissioned the Center for Progressive Reform (CPR) to investigate the effectiveness of the Maryland Department of the Environment's (MDE) Clean Water Act (CWA) enforcement program. This report on that investigation takes a detailed look at whether MDE's efforts to enforce the CWA, in conjunction with the Office of the Maryland Attorney General (OAG), and its response to citizen enforcement initiatives, have contributed to the CWA's goal of enhancing and protecting water quality in the manner envisioned by Congress. Over a 15-week period, CPR investigated MDE's enforcement record with respect to major sources of pollution to the Chesapeake Bay: sewage treatment plants, industrial and municipal facilities, construction sites, and concentrated animal feeding operations. This report identifies a series of recommendations to revitalize and reinvigorate enforcement of CWA requirements in Maryland.

The research for this report was compiled and co-authored by CPR Member Scholar Robert Glicksman, the J.B. and Maurice C. Shapiro Professor of Environmental Law at the George Washington University School of Law in Washington, D.C., and Yee Huang, CPR Policy Analyst. Professor Glicksman is a nationally recognized expert in Clean Water Act enforcement. He has recently co-authored *Pollution Limits and Polluters' Efforts to Comply: The Role of Government Monitoring and Enforcement* (Stanford University Press, forthcoming 2010), a detailed examination of nationwide Clean Water Act enforcement.

The authors relied on three methods to gather the information reported here: publicly available online sources and reports; a review of scholarly literature on enforcement mechanisms, effectiveness, and design; and interviews with 16 key stakeholders in Maryland. The authors sent MDE a draft copy of this report and met with several members of the enforcement staff. MDE's response is included as appendix A, (see page 58).

The enforcement statistics and other data contained in this report are drawn from MDE's Annual Enforcement and Compliance Reports from FY 2000 to FY 2009. Other sources used and available online include: reports from the Maryland Office of Legislative Audits, the federal Government Accountability Office, and the Congressional Research Service, as well as *Keeping Pace: Maryland's Most Important Environmental Problems and What We Can Do to Solve Them*, a 2002 report by the University of Maryland Environmental Law Clinic, and the 2007 *Maryland Transition Work Group Report on Environment and Natural Resources*.

To better understand how MDE's enforcement program operates on the ground, CPR conducted a series of interviews with stakeholders across Maryland. Interview participants were asked to respond to a series of open-ended and general questions about the enforcement of Clean Water Act requirements in Maryland, particularly with respect to efforts to restore the Chesapeake Bay. To encourage a candid dialogue, participants were informed that their specific statements during the interview would remain confidential but that the list of interviewees would be made public. That list is included in the Interview

Findings section. The authors made every effort to consult a balanced and diverse group of stakeholders in order to ensure that the perspectives of state and local governments, regulated industries, and public interest groups were fully represented, and the authors believe they achieved this fundamental goal.

Ultimately, because MDE is starved for resources and has persisted in carrying out an inadequately designed program, its CWA enforcement program is ineffective in creating the appropriate level of deterrence against noncompliance by the full range of regulated entities. Funding gaps have persisted for so long that, according to many interviewees, MDE's staff has internalized an unacceptably low series of expectations for their performance in enforcement by, for example, primarily relying on paper inspections of self-monitoring reports to determine compliance. Few, if any, credible experts in the operation of a deterrence-based enforcement program, whether in the government, the private sector, or among publicly-funded organizations, would agree that primary reliance on paper inspections results in an effective enforcement program. As troubling, a backlog of 325 case referrals awaiting assignment in OAG indicates that even MDE's unacceptably weak efforts to verify compliance and implement an effective deterrence-based enforcement program are crippled by lack of legal representation.

Given gaps in existing record-keeping, it is difficult to assess in any reliable, quantitative manner how these dramatic weaknesses in the enforcement program translate into pollution in the Chesapeake Bay. However, all Maryland stakeholders concerned about restoring the Bay to the point where it is once again a vibrant, healthy, and internationally renowned natural resource would do well to put inadequate enforcement of existing law at the top of their list of priorities for reform. Stakeholders interviewed generally concluded that MDE is in the "middle of the pack" of states in the Bay region where enforcement is concerned. If these perceptions are correct, the state can do better. It is critically important to the health of state residents and the quality of the environment that the political leadership in Maryland and at MDE commit to taking the steps that will allow it to lead the region in CWA enforcement efforts.



## Maryland's Waters: An Overview

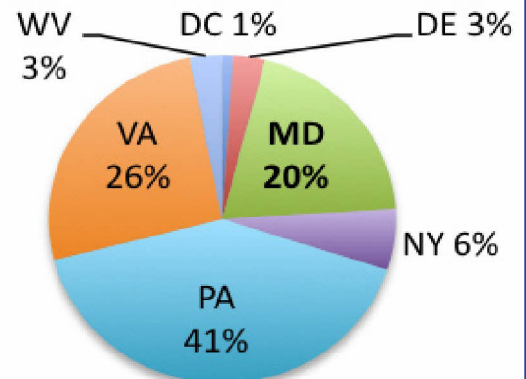
Maryland has more than 7,000 miles of coastline and thousands of stream and river miles and lake acres, and the Chesapeake Bay is the crown jewel of Maryland's natural resource heritage. Nearly the entire state lies within the Bay's watershed. The Bay provides a rich source of economic and aesthetic wealth for the state from fishing, tourism, and recreation. Unfortunately, because of pollution, the health of the Bay is tenuous—improved from its condition in the 1980s, but still far short of what Bay scientists consider healthy. The primary pollutants in the Bay are nitrogen, phosphorous, and sediment. In appropriate quantities, nitrogen and phosphorous are beneficial nutrients. In excess, however, these nutrients accumulate in the Bay and contribute to algal blooms and dead zones during the summer months.

Agriculture is the largest source of each pollutant, contributing 38 percent of the nitrogen, 45 percent of the phosphorous, and 60 percent of the sediment to the Bay. Agriculture makes up 25 percent of the land use in the watershed, and pollution from agricultural runoff is often the least expensive to reduce. Unfortunately, regulation of agricultural runoff is inconsistent, and much of it escapes regulation under either federal or state water pollution control laws.

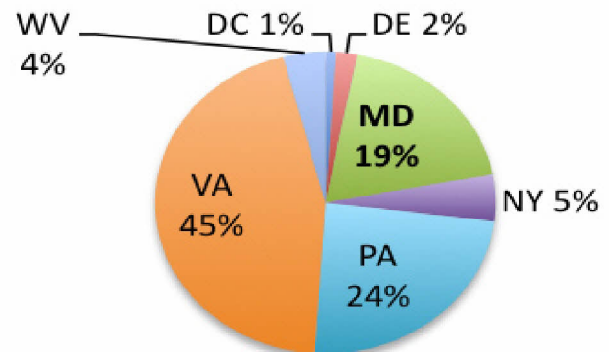
Runoff from the urban and suburban sectors is another major contributor of pollutants to the Bay and is particularly troublesome because it is the only increasing source of pollution. As land is urbanized and converted to asphalt or concrete surfaces, and as construction sites alter the topography, the natural surfaces lose the ability to absorb water naturally through the ground. These impervious surfaces channel concentrate water flow, washing contaminants, including sediment and oil and gas residue from roads, into local waterways, especially during heavy rains. During the 1990s, the population in the Bay increased by 8 percent, while the impervious surface in the Bay watershed increased disproportionately, by 40 percent. As the population continues to grow, impervious surface area will only increase, highlighting the importance of wet weather water quality control.

Maryland contributes approximately 20 percent of the nitrogen and phosphorus pollution in the Bay. Because Maryland has a long cultural and economic history of benefitting from some of the most scenic and bountiful segments of the Chesapeake Bay, it has always acknowledged a deep stake in the process of restoring contaminated and degraded resources. A 2004 estimate by the Chesapeake Bay Watershed Blue Ribbon Finance Panel estimated the

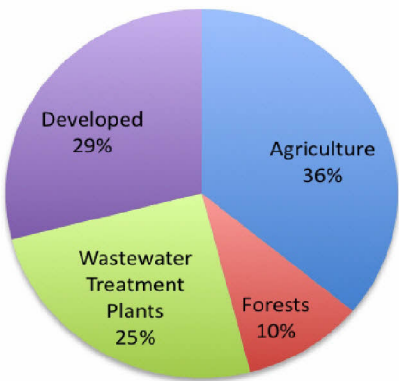
**FIGURE 2: Nitrogen Loadings by State**



**FIGURE 3: Phosphorus Loadings by State**

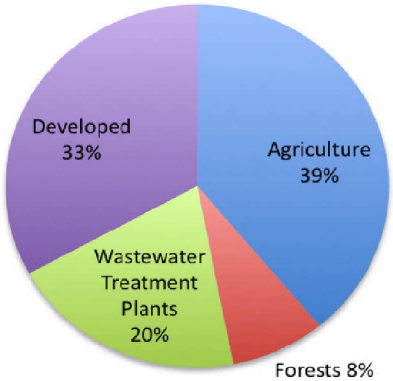


**FIGURE 4: Sources of Nitrogen in Maryland**



economic value of the Bay to over \$1 trillion annually. The state has passed a series of laws intended to strengthen restoration efforts, including the Chesapeake Bay Restoration Act and the Maryland Healthy Air Act. Despite these efforts, and the expenditure of billions of dollars in federal aid over the past 20 years, water quality and the health of precious ecosystems, including fishing resources, within the Bay have not improved during this period. The Chesapeake Bay Program, a consortium of the Bay Watershed states, has missed high-profile deadlines for lowering pollution in the Bay and restoring natural resources, especially with respect to nutrient loading. Restoration of the Chesapeake Bay requires a strong, committed enforcement program in Maryland and in all Bay states.

**FIGURE 5: Sources of Phosphorus in Maryland**





## The Clean Water Act: Enforcement Structure

### Government Enforcement: Two Approaches

The 1972 Clean Water Act (CWA) fundamentally restructured the legal mechanisms for protecting the nation's waters. It established a water pollution control strategy based on the premise that prohibiting the discharge of pollutants without a permit that imposes stringent controls on polluting sources is the best way to improve water quality. The heart of the CWA's implementation and enforcement strategy is the National Pollution Discharge Elimination System (NPDES) program. All point sources—specific, identifiable sources of pollution—must obtain a NPDES permit and comply with the limits on discharges (called effluent limits) that it sets. Those limits are based on both the source's capability to reduce its discharges using the best available pollution control technology and supplemental controls needed to achieve levels of water quality that protect the public health and welfare and enhance water quality. Each NPDES permit specifies the frequency with which permit holders must submit Discharge Monitoring Reports (DMRs), or the results from self-monitoring.

By law, EPA may delegate to states the authority to administer the NPDES permit program if the state establishes a program that satisfies the minimal requirements established in the CWA. EPA may also withdraw that delegation of authority if a state fails to administer the program in compliance with CWA requirements. If EPA withdraws authority for a state program, it must administer a federal permit program in the affected state.

The adoption of environmental quality laws, of course, does not of itself protect the nation's waters. Achievement of statutory environmental protection goals depends on rigorous enforcement. The CWA establishes two primary enforcement mechanisms:

1. **Civil and criminal enforcement actions by the government**, either EPA or a state with delegated authority; and
2. **Civil enforcement actions by citizens acting as private attorneys general** to supplement governmental enforcement initiatives.

At the time the CWA was passed, Congress recognized that even the best designed and most well-intentioned enforcement programs could not and would not catch all violations. Resource limitations preclude federal and state officials from identifying and pursuing all instances of regulatory violations. Aware of these limitations, and intent on providing a safeguard against excessive alignment by regulators with the interests of those they regulate, Congress included citizen suit provisions to supplement government enforcement initiatives. The CWA's citizen suit provision serves as a safety net to catch violations that elude detection or enforcement by federal and state regulators.

The CWA vests concurrent jurisdiction in both the federal and state governments to enforce discharge limits and related permit responsibilities. The CWA delegates to EPA fundamental oversight responsibilities but gives a state the first opportunity to address alleged violations

of the permits it issues. If EPA discovers that a discharger has violated the terms of a NPDES permit, EPA must first notify the discharger and the state. The state then has a 30-day period to take appropriate enforcement action against the discharger, after which EPA must issue an administrative compliance order or refer the case to the Department of Justice (DOJ) for pursuit of a formal, civil enforcement action. The CWA allows EPA to bypass state enforcement, however, by issuing an administrative compliance order or referring the violation to the DOJ without waiting for the state to act.

Government enforcement of laws such as the CWA generally follows one of two models: deterrence-based or cooperative enforcement. Since the enactment of the CWA, EPA has relied primarily on deterrence-based enforcement to achieve the law's water quality

protection objectives, although it has used cooperative approaches as well in recent years.

### **Deterrence-based enforcement is characterized by four essential elements:**

#### **1. Sufficient, consistent, and regular compliance monitoring to identify violators.**

The Clean Water Act requires that regulated entities provide self-monitoring reports of their discharges to the enforcement authority and the public. These discharge monitoring reports (DMRs) disclose the pollution discharges recorded by the entity's monitoring systems. DMRs are an important tool in any enforcement program. In addition to monitoring requirements, however, the typical NPDES permit imposes a range of other crucial requirements on facilities that may not be included in the DMR. For example, a review of even properly completed DMRs would not reveal whether the equipment in question was operating correctly, nor would it reveal whether the facility had added unpermitted operations to its physical structure. Limiting compliance monitoring to a paper review of DMRs cannot possibly form the foundation for a viable enforcement program. As a practical matter, such reliance is the functional equivalent of allowing companies to regulate themselves.

#### **2. Timely initiation of enforcement actions against violators.**

Once a violation is uncovered during a routine inspection of a regulated entity, the enforcement authority must assess civil and, in appropriate cases, criminal penalties against the owners and operators of the facility.

#### **3. A mandate that the violator come into compliance with applicable laws and regulations.**

The CWA grants EPA and MDE ample authority to enjoin violators from engaging in future violations and this injunctive relief must be designed to establish a series of checks and balances to prevent recidivism.

#### **4. Imposition of penalties that, at a minimum, eliminate any economic benefit that the violator gained from violating the law and that provide a deterrent for future violations.**

All enforcement actions must recover the violator's economic benefit of noncompliance or "avoided compliance costs" during the entire period of violations and, preferably, impose sufficient additional penalties to deter the targeted violator and all similarly situated regulated entities from committing future violations. Unless the government extracts from violators the economic gains resulting from noncompliance, it will almost certainly be cheaper to violate and pay any penalties assessed than it would be to comply, thereby frustrating the essential underpinning of deterrence-based enforcement.

#### ***Deterrence-Based Enforcement***

Deterrence-based enforcement is based on the theory that those subject to legal obligations weigh the costs and benefits of complying with them. If the costs of complying with the law are lower than the costs of violating it, a rational regulated entity will comply with the law, goes the theory. If, however, the size of the penalties for violation, discounted by the probability that the government will pursue them, makes it cheaper to violate than to comply, a rational profit-maximizer will choose noncompliance.

Deterrence-based enforcement works, therefore, only if the threat of enforcement is credible. Part of the calculus involves assessing the likelihood that the government will detect a violation and decide to take enforcement action. In assessing whether compliance or noncompliance makes more sense, regulated entities will discount the amount of the penalties that may result from enforcement by the probability that enforcement will occur.

The 2009 Enforcement Action Plan issued by EPA's Office of Enforcement and Compliance Assurance describes well the outcomes deterrence-based enforcement seeks to promote:

Effective enforcement programs create incentives for compliance by penalizing those who do not follow the law. They establish a level playing field between those members of the regulated community who comply and those who do not. Enforcement ensures fair treatment – companies that compete against each other should not face wide disparities in treatment across the country, such as mandatory minimum penalties for a violation in one state and no enforcement in another.

EPA's civil penalties policy emphasizes two components: (1) the gravity of the violation and (2) recovery of any financial gain derived by the regulated entity from violating the law ("benefit of noncompliance"). This policy is intended to ensure that violators gain absolutely no financial benefit from violating the law.

### ***Cooperative Enforcement***

A second approach to enforcement has come into more frequent use in recent years. Cooperative enforcement is based on the theory that businesses are inclined to comply with the law because of political, social, and economic norms and pressures. These external and internal forces reduce the need for the imposition of sanctions by enforcement agencies. The proponents of this approach posit that violations occur because regulated entities, and in particular small businesses, are not familiar with the multiple and complex regulations in force. Under this approach, regulatory agencies provide advice and consultation to businesses and the regulated community to prevent violations. When a violation is identified, these agencies rely on cooperative approaches and voluntary efforts to bring violators into compliance as quickly as possible.

The effectiveness of the cooperative, business-friendly enforcement strategies favored by a number of states has yet to be proven. Few states have demonstrated improvements in compliance or improved environmental conditions as a result of a shift toward cooperative enforcement strategies. If a cooperative regime reduces incentives for compliance by lowering the likely costs of noncompliance, reliance by state enforcement officials on this regime could lead to higher rates of noncompliance by firms and increased public exposure to harmful pollutants. It also could undermine the national uniformity Congress intended in enacting the federal environmental laws if the penalties for noncompliance differ noticeably from state to state based on the enforcement model that each state adopts.

### ***Shortfalls in Funding***

When EPA first started delegating federal authority to the states in the 1970s, it routinely awarded federal grants to states to assist with the costs of the administrative infrastructure required to implement the program. In the 1980s and 1990s, however, this funding gradually



### For more information on deterrence-based enforcement:

- CPR, The States' Role in Environmental Protection, <http://www.progressivereform.org/persp-Devolution.cfm>;
- Joel Mintz, CPR, Environmental Enforcement: What Works?, <http://www.progressivereform.org/perspEnvironenforce.cfm>;
- Robert Glicksman and Dale Earnhart, Depiction of the Regulator-Regulated Entity Relationship in the Chemical Industry: Deterrence-Based v. Cooperative Enforcement, 31 WM. & MARY ENVTL. L. & POL'Y REV. 603 (2007), available at <http://ssrn.com/abstract=952778>; and
- David L. Markell, The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality, 24 HARV. ENVTL. L. REV. 1 (2000), available at <http://ssrn.com/abstract=1547897>.

declined, in large measure because of budget deficits at the federal level. In recent years, states have been unable or unwilling to make up these shortfalls, creating a major challenge for state enforcement programs. Between fiscal years 1997 and 2006, federal funding for enforcement efforts in the EPA regions declined in real terms by 8 percent. A 2009 Government Accountability Report (GAO) emphasized that federal funding has not kept pace with inflation or the ever-growing list of regulatory responsibilities.

In addition, the federal funds provided to the states and to EPA regions to implement and enforce state permit programs have not accounted for the current workload, including implementing basic statutory requirements under the CWA, or broader goals and objectives in the EPA's strategic enforcement plan.<sup>1</sup> For example, seeking to develop a more systematic, data-driven method for budgeting and allocating resources that more accurately reflected the resources needed by states to adequately fulfill their CWA implementation and enforcement responsibilities, in 1998 EPA developed a tool to allow states to estimate the amount of resources needed to fully implement the CWA. Due in part to resource constraints, EPA did not implement this tool, despite the conclusion of independent reviewers that it was sound and could have been useful.

A 2007 GAO report highlighted other obstacles to effective enforcement by federal and state officials.<sup>2</sup> EPA lacks basic information about state enforcement programs, including whether states have enough enforcement personnel to meet the responsibilities the state undertook when it received authority to administer the NPDES program. The GAO also found that unclear communication of EPA planning and priority setting causes confusion within EPA regional offices and state agencies. State officials complained of micromanagement by EPA without explanation or consultation.

### Citizen Suit Enforcement

Like most federal environmental statutes, the CWA contains a citizen suit provision that empowers citizens and public interest organizations to bring enforcement actions against dischargers for violating their permits.<sup>3</sup> In creating this second track of enforcement by "private attorneys general," Congress reasoned that the ability to bring such lawsuits would strengthen democratic values by allowing citizens to redress grievances; ensure that citizens, as well as well-financed regulated entities, have access to the federal courts in matters relating to implementation and enforcement of the CWA; and complement government enforcement actions, particularly in situations where governmental action is deficient or lacking.

The CWA's citizen suit provision provides that any citizen may bring a civil action against any person who is alleged to be in violation of an effluent standard or limitation or of an

administrative compliance order.<sup>4</sup> Before proceeding, however, the citizen must give the Administrator of EPA, the state, and the alleged violator notice of the suit and must allow a 60-day period for the violation to be corrected. To help finance citizen suits, the court may award attorney's fees to the prevailing party.

During the 60-day notice period, a state may initiate its own action against the violator. In several instances, states have "over-filed" enforcement actions within this time frame in state court. These cases are often pursued at the request of the violator, who solicits state enforcement to shield itself from a citizen suit. If a state action commences and continues to diligently pursue enforcement action, the only remaining option for the citizen is to intervene in the suit at the state court level. The availability of opportunities for intervention depends on state law.

Citizen suits have made a significant mark as an environmental enforcement tool. One report found that between 1973 and 2002, citizens initiated actions that resulted in more than 1,500 reported federal decisions.<sup>5</sup> In the decade between 1993 and 2002, federal courts averaged 110 civil environmental cases per year, approximately 75 percent of which were citizen suits.<sup>6</sup>



## Maryland's Clean Water Act Enforcement Program

MDE implements the NPDES permitting program of the CWA through four programs:

- **Municipal and Industrial Surface Water Discharges**, which covers traditional discharges through a pipe into lakes, rivers, and streams from publicly owned treatment works (POTWs) and factories;
- **Pretreatment Industrial Discharges**, which covers discharges from an industrial plant into a POTW after pretreatment to lower chemical toxicity so that the POTW is capable of adequately treating the waste;
- **Stormwater Management and Erosion & Sediment Control**, which covers run-off from land and paved surfaces into storm drains; and
- **Concentrated Animal Feeding Operations**, which covers run-off from farm facilities that raise more than a minimum number of certain types of livestock.

These programs are housed in MDE's Water Management Administration (WMA), which includes a Compliance Program as well as a range of federal and state water permitting programs. For the sake of simplicity, the discussion below refers to these organizational units as MDE, unless otherwise noted. In 2009, WMA had 46.4 full-time inspectors, who were responsible for 54,942 permits in all its programs, including CWA permitting programs and other state water law permitting programs. For CWA programs alone, 13,681 permits were in effect in FY 2009.

MDE assigns priority for its sharply limited inspection resources to (1) sites that are subject to complaints from citizens; (2) oversight of owners and operators that have violated self-monitoring and self-reporting requirements in the past; and (3) oversight of owners and operators in violation of the permitted effluent limits. MDE conducts DMR reviews and, less frequently, site inspections to determine whether or not the facility or site meets the criteria for significant noncompliance. The function of these reviews is to assess:

- Whether the facility has exceeded the federal threshold for significant noncompliance, which is a discharge of 20 percent or more above permitted levels for toxic pollutants or a discharge of 40 percent or more above permitted levels for conventional pollutants;
- Whether illegal discharges have caused or could cause an adverse impact to public health or the environment;
- Whether the violation represents willful, chronic, or recalcitrant behavior;
- Whether the plant owner or operator has deviated substantially from mandatory permit terms or other binding documents; or
- Whether the violation is not corrected within 60 days of notification that a violation is occurring.

**TABLE 1. Comparison of penalties under Maryland state law and the Clean Water Act**

	State of Maryland Md. Envir. § 4-417	Clean Water Act 33 U.S.C. § 1319
Civil Penalty – First Offense	Not exceeding \$25,000 per day per violation For CWA violations, not exceeding \$10,000 per day per violation. See Md. Env't. Code § 9-342 & 9-342.1 (2010).	33 U.S.C. § 1319(d) As enacted, not exceeding \$25,000 per day per violation For penalties effective after January 30, 1997, through March 15, 2004, not exceeding \$27,500 per day per violation <sup>1</sup> For penalties effective after March 15, 2004, through January 12, 2009, not exceeding \$32,000 per day per violation For penalties effective after January 12, 2009, not exceeding \$37,500 per violation per day
Civil Penalty – Subsequent Offense	Additional civil penalty, up to \$10,000 per day per violation, not exceeding a total of \$100,000, considering penalty factors	n/a
Criminal	For the first violation, conviction of a misdemeanor, and a fine not exceeding \$50,000 or by imprisonment not exceeding 1 year, or both, and may be enjoined from continuing the violation For a subsequent violation, a fine not exceeding \$50,000 per day of violation and imprisonment not exceeding 2 years, or both	See below
Criminal Penalty – Negligent Offense	n/a	33 U.S.C. § 1319(c)(1) For the first violation, a mandatory minimum fine of not less than \$2,500 nor more than \$25,000 per day of violation, or imprisonment of not more than 1 year, or both For a subsequent violation, a fine of not more than \$50,000 per day of violation or by imprisonment of not more than 2 years, or both
Criminal Penalty – Knowing Offense	n/a	33 U.S.C. § 1319(c)(2) For the first violation, a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment of not more than 3 years, or both For a subsequent violation, a fine of not more than \$100,000 per day of violation, or by imprisonment of not more than 6 years, or both
Criminal Penalty – Falsification of Information & Tampering with Monitoring Devices	A fine not exceeding \$10,000 or imprisonment not exceeding 6 months, or both	33 U.S.C. § 1319(c)(4) For the first violation, a fine of not more than \$10,000, or by imprisonment of not more than 2 year, or both For a subsequent violation, a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than 4 years, or both
Administrative	n/a	<b>Class I Civil Penalty, 33 U.S.C. § 1319(g)(2)(A)</b> As enacted, a fine not to exceed \$10,000 per violation, and the maximum amount shall not exceed \$25,000 For penalties effective after January 30, 1997, through March 15, 2004, a fine not to exceed \$11,000 per violation; the maximum amount shall not exceed \$25,000 For penalties effective after March 15, 2004, through January 12, 2009, a fine not to exceed \$11,000; the maximum amount shall not exceed \$32,500 For penalties effective after January 12, 2009, a fine not to exceed \$16,000; the maximum amount shall not exceed \$37,500 <b>Class II Civil Penalty, 33 U.S.C. § 1319(g)(2)(B)</b> As enacted, a fine not to exceed \$10,000 per day per violation, and the maximum amount shall not exceed \$125,000 For penalties effective after January 30, 1997, through March 15, 2004, a fine not to exceed \$11,000 per day per violation; the maximum amount shall not exceed \$137,500 For penalties effective after March 15, 2004, through January 12, 2009, a fine not to exceed \$11,000; the maximum amount shall not exceed \$157,500 For penalties effective after January 12, 2009, a fine not to exceed \$16,000; the maximum amount shall not exceed \$177,500

<sup>1</sup> On January 12, 2009, the EPA's Civil Monetary Penalty Inflation Adjustment Rule became effective. This rule adjusts EPA's civil monetary penalties for inflation. The adjustment is based on the Consumer Price Index published by the U.S. Department of Labor. 40 C.F.R. § 19.4 (2009).

For violations that MDE deems minor, such as record-keeping or reporting errors, it has the discretion to allow the facility to correct a documented problem, either past or ongoing, without taking formal action. Significant violations or repeated minor violations warrant more serious legal action, which can include a combination of penalties, corrective orders, stop-work orders or injunctions, and criminal sanctions.

Maryland law provides the statutory minimums for civil and criminal penalties, as well as factors to determine the penalty amount.

MDE determines the size of administrative penalties on the basis criteria such as:

- Willfulness of the violation and pattern of violation by facility;
- Actual harm to the environment or human health;
- Cost of clean-up or restoration;
- Ability to control, reduce, or prevent the violation; and
- Degree of danger posed by the violation.

Like most other federal and state enforcement agencies, MDE reduces penalties on the basis of good faith behavior by the violator, including prompt self-disclosure of the violation; prompt and voluntary corrective action; the development of plans to prevent future recurrence of the violation; and full cooperation with MDE to investigate the violation.

Noticeably missing from the list of factors used to determine the penalty amount is any effort to recover the economic benefit of the violation to the violator. As discussed earlier, the recovery of the violator's economic benefit of noncompliance is essential to an effective enforcement program.

Penalties may also take the form of Supplemental Environmental Projects (SEPs), which are environmental projects undertaken by violators that are not otherwise required by law in lieu of penalty dollars. Between 2000 and 2009, MDE authorized a total of 31 SEPs with an estimated value of \$13,615,300. While SEPs are intended to achieve environmental benefits that would not be achieved by traditional penalties, the same results may also be achieved by issuing strong injunctive relief that makes parties clean up problems resulting from past noncompliance and protect the environment through future compliance.

MDE also provides a variety of pre-enforcement compliance education and assistance. For example, an inspector may identify a specific change that a regulated facility can make to prevent a future violation, and encourage the facility voluntarily and in a timely manner to correct the problem. Through the Permitting and Customer Services Office, MDE also assists businesses that need permits or MDE approval to understand their legal responsibilities.

### **Trends in Enforcement, 2000-2009**

Under the Maryland Environment Code, section 1-301(d), MDE is required to publish an annual report on its enforcement activities during the previous year. The following analysis



is based on data from FYs 2000 to 2009 contained in MDE's Annual Enforcement and Compliance Reports, which are posted on MDE's website.

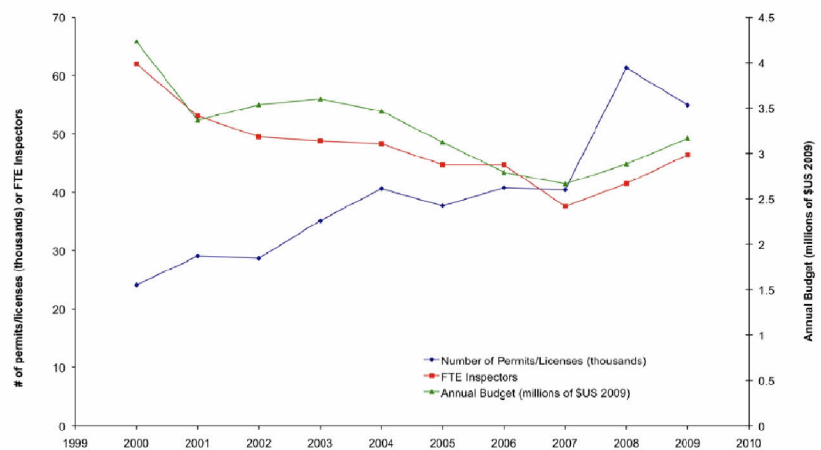
One of the most striking aspects of these reports, when examined cumulatively, is the overall decline in resources and a contemporaneous increase in permits and enforcement responsibilities. The overall budget for MDE's CWA enforcement workforce has decreased by almost 25 percent since 2000, adjusted for 2009 values. While the FY 2009 budget represents an increase from the lowest budget in 2007, the overall decrease coincides with a doubling of permits in effect during the same period. Not surprisingly, the budget has a significant impact on the number of inspectors.

Similarly, the total number of inspector positions allocated, including both filled and vacant positions, has decreased overall by 12 percent from a high of 63.3 positions in 2000 to a low of around 47.5 positions in 2007 and 2008. In 2009, the number of allocated positions increased to 55.9. Even more dramatic, however, is the overall decrease in the number of filled, full-time inspector positions, from 62 inspectors in 2000 to 46.4 inspectors in 2009—a 25-percent decrease in active inspectors. With the doubling of the number of permits in effect, the decrease in full-time inspectors means that roughly 1,180 permits are in effect for each inspector, three times the number of permits in 2000.

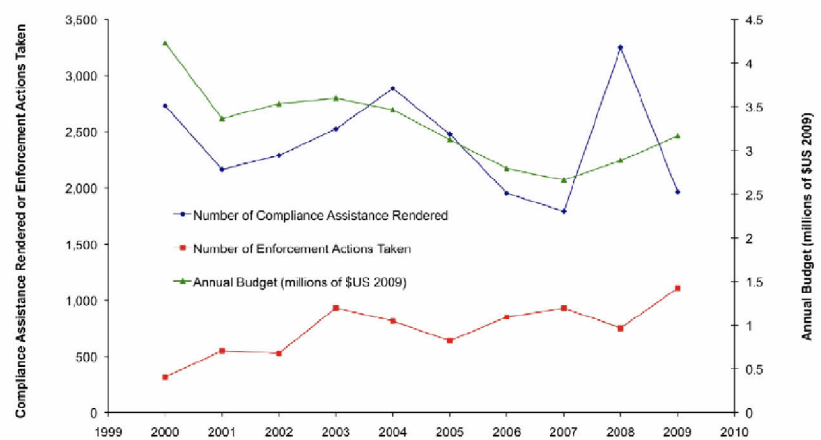
Moreover, MDE is settling for strikingly low penalties. Overall, the average penalty obtained per enforcement action in the WMA over the past 10 years is approximately \$1,260. Not all of these actions fall under the CWA, but it is startling to consider that this average is roughly 5 percent of the maximum penalty per day authorized under the CWA, as enacted, and roughly 12.6 percent of the penalty amount authorized per day for CWA violations Maryland law.

From 2000 to 2009, average penalties were higher for municipal and industrial dischargers with NPDES permits, averaging \$8,265 per enforcement action. However, these

**FIGURE 9: WMA: Enforcement Budget, Inspectors, and Permits in Effect, FY 2000-2009**



**FIGURE 10: WMA: Enforcement Budget, Compliance Assistance, and Enforcement Actions, FY 2000-2009**



are averages for enforcement actions. The penalty structure under both Maryland law and the CWA provide for maximum daily penalties – enforcement actions often involve violations that happen more than once. Under Maryland law, CWA violations are subject to a maximum penalty of \$10,000 per violation per day. Under the Clean Water Act and subsequent adjustments for inflation, the currently penalty maximum is \$37,500 per violation per day. For example, if a polluter violates its permit for three days, it would be subject to either a \$30,000 maximum penalty amount under Maryland law or a \$112,500 maximum under federal law, depending upon which court the case was brought. While the number of penalties issued in any given year does not necessarily reflect the effectiveness of MDE's

enforcement program – a variety of factors can explain a high or low collection rate – the average penalty obtained per enforcement action in Maryland is notably less than the maximum penalties provided per day by law.

In a press release on the FY 2009 enforcement and compliance report, MDE heralded a 7-percent increase in enforcement actions and a 17-percent rise in sites inspected, attributing these increases to an initiative to improve enforcement launched in 2007. The increase in enforcement actions came primarily in sectors unrelated to the CWA, such as drinking water and radiological health.

The 2009 report notes that, despite this overall increase, many enforcement actions are in queue at the Attorney General's Office. The report acknowledges that "legal staffing has not kept pace," and as a result, nearly 40 percent of MDE's referrals—325 cases of 816 cases referred—are still awaiting assignment to or active attention from MDE's legal counsel. For the three MDE

**TABLE 2. Water Management Administration: Enforcement Workforce**

Year	Amount	FY 2009 Values <sup>2</sup>	Inspectors	Vacancies	Total Positions Allocated
2000	\$3,396,824.00	<b>\$4,231,965.33</b>	62	1.3	63.3
2001	\$2,776,893.00	<b>\$3,535,764.14</b>	53.08	3.3	56.38
2002	\$2,964,915.00	<b>\$3,535,764.14</b>	49.5	3.3	52.8
2003	\$3,085,703.00	<b>\$3,597,812.31</b>	48.8	7.2	56
2004	\$3,050,817.00	<b>\$3,464,865.68</b>	48.3	3.8	52.1
2005	\$2,841,357.00	<b>\$3,121,229.94</b>	44.7	5.2	49.4
2006	\$2,624,959.00	<b>\$2,793,406.89</b>	44.7	6.7	51.4
2007	\$2,572,869.00	<b>\$2,662,150.44</b>	37.6	9.8	47.4
2008	\$2,892,037.00	<b>\$2,881,747.78</b>	41.5	6	47.5
2009	\$3,164,632.00	<b>\$3,164,632.00</b>	46.4	9.5	55.9
<b>Overall</b>		<b>25%</b>	<b>25%</b>		<b>12%</b>

<sup>2</sup> These figures were adjusted by the authors according to the Bureau of Labor's Consumer Price Index Calculator, available at <http://data.bls.gov/cgi-bin/cpicalc.pl>.

**TABLE 3. Water Management Administration: Inspectors and Inspections**

Year	No. of Permits or Licenses in Effect	Full-time Inspectors	Permits Per Inspector	No. of Inspections	Inspections Per Inspector
2000	24,108	62	<b>389</b>	9,916	<b>159.9</b>
2001	29,061	53.08	<b>547</b>	9,106	<b>171.6</b>
2002	28,685	49.5	<b>579</b>	10,146	<b>205.0</b>
2003	35,136	48.8	<b>720</b>	12,491	<b>256.0</b>
2004	40,611	48.3	<b>841</b>	13,044	<b>270.1</b>
2005	37,691	44.7	<b>843</b>	13,322	<b>298.0</b>
2006	40,782	44.7	<b>912</b>	12,637	<b>282.7</b>
2007	40,438	37.6	<b>1,075</b>	12,134	<b>322.7</b>
2008	61,294	41.5	<b>1,477</b>	8,630	<b>208.0</b>
2009	54,942	46.4	<b>1,184</b>	7,536	<b>162.4</b>



NPDES programs for which the annual reports include data, in 2009, 76 cases have been resolved and 149 cases are ongoing. While MDE's legal counsel reports to the Attorney General, funding for their positions are located within MDE's budget.

### ***Municipal and Industrial Surface Water Discharges (State and NPDES Permits)***

Under the federal CWA and Maryland law, all industrial, commercial, or institutional facilities that discharge wastewater directly into the waters of Maryland require a NPDES permit. Additionally, concentrated animal feeding operations (CAFOs) must obtain NPDES permits.

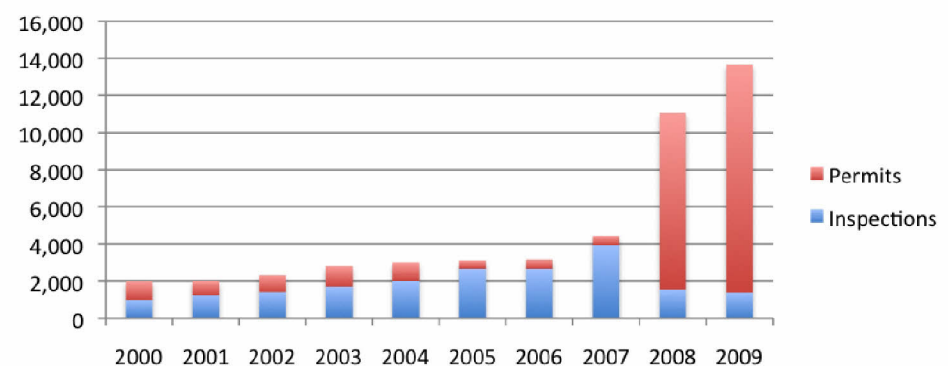
Between FY 2000 and FY 2009, the number of permits in effect increased sharply, primarily due to dramatic increases in 2008 and 2009. In FY 2008 MDE began including all general permits for stormwater associated with construction activity in its calculation of permits in effect. General permits cover an entire category of polluter. Permit holders need not apply for an individual NPDES permit, but must comply with the conditions attached to the general permit for the industrial category involved. The program shows a gradual increase in the number of site inspections, particularly between 2000 and 2007, but with significant drops in 2008 and 2009. The inspection coverage rate, as a result of the dramatic increase in the numbers of permits in effect, dropped sharply in 2008 and 2009, resulting in an overall decline in the inspection coverage rate. From 2000 to 2009, the average penalty per enforcement action was approximately \$8,265.

The number of inspections taken in this program is tied to the weather and the number of wet weather incidents during a particular year. For example in FY 2003, an unusually wet year, the enforcement report noted the increased attention to sewage overflows from municipal sewer systems, which required an inspection of each overflow or spill report received. More generally, reports emphasized that inspections of facilities with surface water discharge permits are a priority and that this program is a high priority.

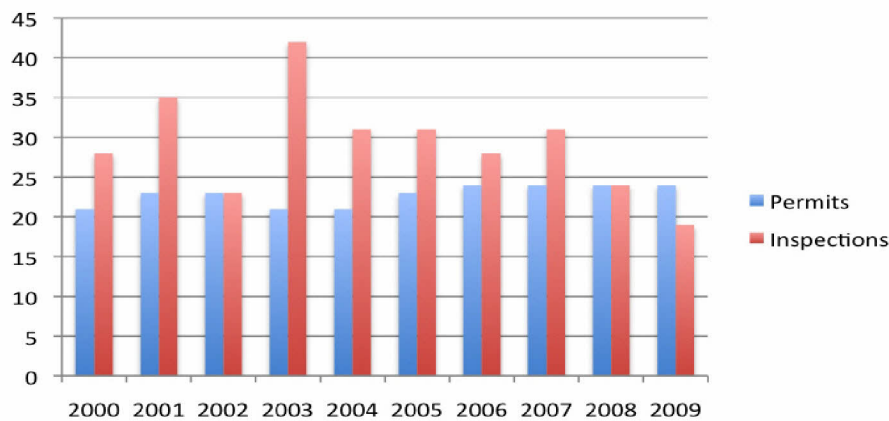
### ***Pretreatment Industrial Discharges***

MDE's responsibility for regulating the discharge of wastewaters extends to regulating wastewaters from industrial and other non-domestic sources discharged to publicly owned treatment works. This oversight helps to ensure that these dischargers do not introduce

**FIGURE 6: Surface Water NPDES Permits and Inspections, FYs 2000-2009**



\*In 2008 and 2009, MDE began including general permits in the total number of permits, causing dramatic increases in those years.

**FIGURE 7: Pretreatment Industrial Discharge Permits and Inspections**

to municipal treatment works wastewater that could harm the works' critical water infrastructure.

As of FY 2009, MDE has delegated responsibility for enforcement actions to 20 local pretreatment programs that are responsible for 198 industrial sources. These local pretreatment programs assume the enforcement duties and authorities of MDE, according to MDE's delegation agreement with EPA. The enforcement actions taken by these programs are not included

in MDE's enforcement statistics. Instead, MDE compliance and enforcement efforts in the pretreatment sector focus on monitoring delegated local pretreatment programs and industrial dischargers that discharge to non-delegated local programs. This supervision requires a significant commitment of resources and, given Maryland's shortfalls in other areas and the importance of controlling this type of discharge to the preservation of environmental quality, this arrangement raises serious concerns about the effectiveness of locally delegated programs in implementing CWA requirements.

Between FY 2000 and 2009, enforcement activity by MDE remained relatively steady, with a nearly 100-percent inspection rate for the delegated authorities and industrial discharges that receive permits directly from MDE. Compared to other programs, MDE oversees relatively few facilities under this program. The number of enforcement actions is low. When enforcement actions do occur, they are primarily compliance assistance activities. From 2000 to 2009, this program took only 13 penalty and other enforcement actions, not including compliance assistance. The average penalty per action was \$22,935. Again, MDE's annual reports do not include information on enforcement activities by locally delegated pretreatment programs, a crucial information gap.

### ***Stormwater Management and Erosion & Sediment Control for Construction Activity***

The purpose of the stormwater program is to reduce the amount of sediment and other pollution that flows into state waters from construction or land use activities associated with urbanization. In Maryland, construction activity that disturbs more than 5,000 square feet or more of land or results in 100 cubic yards or more of earth movement is required to have stormwater management plans and erosion and sediment controls in place before construction activities begin. MDE has delegated inspection and enforcement authority for erosion and sediment control to 14 counties and 10 municipalities. The enforcement

activities conducted by these delegated authorities are not included in MDE's enforcement statistics. Again, the effectiveness and adequacy of MDE's supervision of delegated authorities requires continued attention.

Under Maryland law, construction sites with approved erosion and sediment control plans must be inspected once every two weeks on average. The enforcement reports freely concede inadequate inspections and state that "[t]his requirement is not being met due to workload."

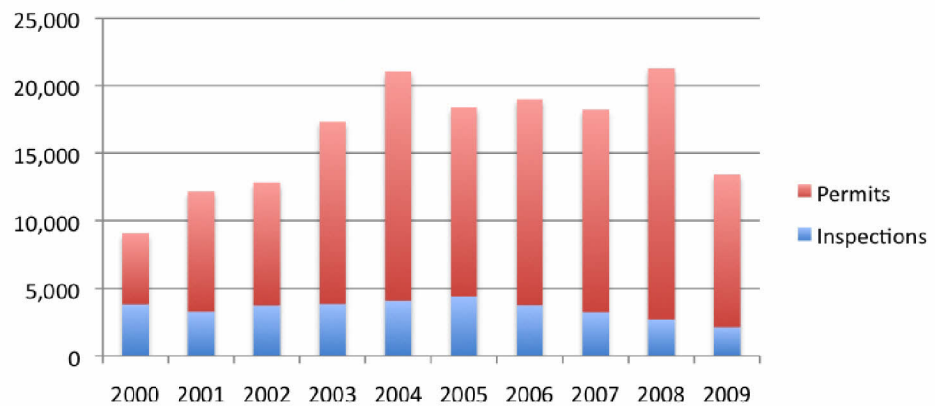
Between FY 2000 and FY 2009, the number of stormwater and erosion and sediment permits in effect has steadily increased overall, despite a sharp drop in permits in effect in 2009. However, the number of sites inspected has slowly decreased. More telling, however, is the sharp decline in the inspection coverage rate, which is calculated as the number of sites inspected divided by the number of permits in effect. According to the reports, in the early 2000s, this program experienced persistent problems with staff vacancies and with resources and staff hours spent on transitioning to a new computer system. However, during these years, MDE noted that the remaining inspectors were highly proficient and thus maintained relatively stable inspection rates. The average penalty per enforcement action in this program from 2000 to 2009 was \$4,786.

### ***Concentrated Animal Feeding Operations***

In 2009, a new permitting program became effective for large animal feeding operations that qualify as either a concentrated animal feeding operation (CAFO) under federal law or a newly established Maryland animal feeding operation (MAFO). Prior to the CAFO permitting program, farm operations were required to have Nutrient Management Plans (NMPs) for farm operators that gross more than \$2,500 annually or have 8,000 pounds or more of live animal weight. Approximately 5,700 farm operations in Maryland are required to have NMPs.

The Maryland Department of Agriculture (MDA) is the agency primarily responsible for inspecting and enforcing farm operators' compliance with NMPs. While not a traditional enforcement authority, MDA has authority under the Water Quality Improvement Act to enter farm facilities to take measurements, but farm operators strongly protest this authority. After three citations from MDA, a farm facility in violation of its NMP will be referred to MDE for further enforcement action, meaning that MDE is fairly far removed

**FIGURE 8: Stormwater, Sediment and Erosion Control Permits and Inspections, FYs 200-2009**





from enforcement of water quality from farm facilities. MDA's enforcement program consists of on-site inspections, analysis of self-reports by farm operators, and follow-up from citizen complaints. MDA states that it conducts on-site inspections of 10 percent of farm operations to determine compliance with NMPs. Little recent information on specific enforcement activities is available.

The new CAFO permit is a separate and distinct program, enforceable by MDE. Whether or not a farm facility falls under this new permitting program hinges, in part, on whether it "proposes to discharge," or is designed with a conveyance system to remove contaminated runoff or wastewater from the production area to the surface waters of Maryland. If a farm qualifies as a CAFO, it is required to obtain a Comprehensive Nutrient Management Plan (CNMP) from the USDA Natural Resources Conservation Service. If a farm qualifies as a MAFO, it must obtain both an NMR and a conservation plan or a CNMP. All other farms are still required to have NMPs, enforceable by MDA as described above, under Maryland law. The CAFO program authorizes on-farm inspections and enforcement of water quality problems by MDE.

Because this program is new, there are limited statistics regarding enforcement efforts. As of March 2010, some 506 farms have submitted applications for CAFO status.

### **Gaps in MDE's Annual Reports and Enforcement Data**

The clearest observation in enforcement in Maryland is that resources have decreased at the same time that the number of permitted facilities has increased dramatically. Fewer inspectors are responsible for assessing compliance with more and more permits, and inspection coverage rates are down, meaning more facilities slide by each year without physical inspections.

Yet the statistics in MDE's annual enforcement reports do not present a complete picture because, although MDE offers explanations for variations from year to year, those explanations do not fully or thoroughly detail MDE's enforcement actions. Instead, the reports use different definitions of site categories from year to year, making it difficult to track trends. They also have crucial information gaps and reporting inconsistencies.

Significantly, the enforcement statistics in MDE's reports do not include enforcement activities conducted by other local delegated jurisdictions and vary depending on how certain enforcement activities are counted. In Maryland, 20 publicly owned treatment works have delegated enforcement authority over indirect industrial dischargers to their facilities. However, MDE does not include this information in its annual reports. Both MDE and the public would benefit from having this information available to determine whether these delegated authorities are conducting appropriate enforcement actions.

The reports sometimes include DMR reviews in the number of sites inspected, even though the sites are not physically inspected. This counting method increases the inspection

coverage rate for individual programs, even though the number of physical site inspections has not actually increased or, in some instances, has decreased. For the Municipal and Industrial Surface Water Discharges, the inspection coverage rate from 2000 to 2007 is fairly high, ranging from a low of 49 percent in 2000 to a high of 89 percent in 2007. However, in 2008 and 2009, MDE separated the number of sites physically inspected from the sites audited but not inspected (previously combined), and the coverage rate dropped significantly, to a mere 14 percent and 10 percent, respectively.<sup>7</sup> This inconsistent counting method renders comparisons of statistics from year to year very difficult, even though the reports are required to contain the same information.

Furthermore, the Compliance Program freely acknowledges—and the enforcement statistics clearly demonstrate—that the vast majority of inspection and monitoring activities are not physical on-site inspections.<sup>8</sup> Instead MDE relies on self-reporting by the regulated community. While these reports are an important part of environmental enforcement, they can never substitute for physical inspections. The reports may be fraudulent or fail to include important information; they do not account for unpermitted activities; and DMRs represent only the extent to which sources complied with their discharge limits, but not other important obligations, such as compliance with schedules for construction of new pollution control techniques.

In 2005, a federal court indicated that paper reviews of self-monitoring reports are insufficient to assure compliance under an analogous federal environmental act. This court struck down a rule issued under the Clean Air Act that governed the scope of the Act's new source review permit program based on EPA's implicit assumption that sources are trustworthy and will provide accurate information that is relevant to determining their compliance status.<sup>9</sup> The court concluded that EPA took inadequate steps to verify the accuracy of the information supplied by regulated sources on their compliance status. Thus, relying on agency review of paper records submitted by regulated entities, without follow-ups in the form of on-site inspections, is an inadequate response to an increase in the number of permits issued. Instead, agency personnel and resources must keep pace as the scope of regulated programs expands so that on-the-ground inspections are conducted with regularity. Any other result is sure to result in slippage in the form of lower compliance rates.

Finally, the annual enforcement reports from 2006-2009 contain considerably less information, self-evaluation, and explanations of the statistics than in previous years. Including this information would help make the data more understandable and benefit both MDE, by providing the opportunity to explain any discrepancies, and the public, by enhancing the transparency of agency enforcement activity.

**TABLE 4. Water Management Administration: Performance Measures, FYs 2000-2009**

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
<b>PERMITTED SITES/ FACILITIES</b>										
Number of Permits/Licenses in Effect at Fiscal Year End	24,108	29,061	28,685	35,136	40,611	37,691	40,782	40,438	61,294	54,942
<b>INSPECTIONS</b>										
Number of Sites Inspected	9,916	9,106	10,146	12,491	13,044	13,322	12,637	12,134	8,630	7,536
Inspection Coverage Rate	41%	31%	35%	36%	32%	35%	31%	30%	14%	14%
Number of Inspections, Audits, Spot Checks	55,600	59,787	66,592	65,010	62,596	61,407	61,093	58,693	63,426	62,620
<b>ENFORCEMENT ACTIONS</b>										
Number of Compliance Assistance Rendered	2,732	2,164	2,289	2,524	2,885	2,477	1,953	1,790	3,249	1,965
Number of Enforcement Actions Taken	316	550	528	932	813	641	849	930	752	1,107
<b>PENALTIES</b>										
Amount of Administrative or Civil Penalties Obtained	\$1,316,226	\$639,434	\$464,847	\$897,436	\$328,535	\$632,301	\$1,614,404	\$890,741	\$1,899,396	\$679,013
<b>Average Penalty/Enforcement Action</b>	<b>\$4,165.27</b>	<b>\$1,162.61</b>	<b>\$880.39</b>	<b>\$962.91</b>	<b>\$404.10</b>	<b>\$986.43</b>	<b>\$1,901.54</b>	<b>\$957.79</b>	<b>\$2,525.79</b>	<b>\$613.38</b>



## Interview Findings

To better understand how enforcement works on the ground, CPR conducted a series of interviews with Maryland stakeholders to determine how they perceive MDE's enforcement program and to help identify strengths, weaknesses, and gaps in enforcement. CPR requested interviews with 20 stakeholders who represent a diverse group of current and former government officials, members of the regulated community, and public interest groups. Of the 20 individuals or organizations with which CPR requested interviews, four declined or did not respond. Their views are not included. The findings below are drawn from interviews with the remaining 16 stakeholders.

Collectively these interviewees have decades of enforcement experience in federal, state, and local government levels, in the regulated sector, and in the public interest community. Eleven of the participants are attorneys by training, and their past and current experience covers both prosecuting and defending environmental enforcement cases at all levels. The interview participants were thus able to provide an expert and holistic view of MDE's enforcement program, drawing on their past and current experiences.

The stakeholders interviewed include:

- **Jane Barrett**, Associate Professor and Director, University of Maryland Environmental Law Clinic, and former Attorney, Environmental Crimes Unit, OAG, and former Chief, Environmental Litigation, and Assistant U.S. Attorney, District of Maryland;
- **Valerie Connelly**, Director of Government Relations, Maryland Farm Bureau;
- **James L. Hearn**, Environmental Legislative Support, Washington Suburban Sanitary Commission, and former Director, Water Management Administration, MDE;
- **Brad Heavner**, State Director, Environment Maryland;
- **Robert Hoyt**, Director, Montgomery County Department of Environmental Protection, and former Assistant Secretary, MDE;
- **Jonas Jacobson**, Director, Baltimore County Department of Environmental Protection and Resource Management, and former Deputy Secretary, MDE;
- **Steven Johnson**, Principal Counsel to MDE, OAG;
- **Tina Meyers**, Fellow, University of Maryland Environmental Law Clinic;
- **Jonathan Mueller**, Director of Litigation, Chesapeake Bay Foundation and former Senior Attorney, Environmental Enforcement Section, U.S. Department of Justice;
- **Jennifer Peterson**, Attorney, Environmental Integrity Project;
- **Eliot Powell**, President, Whitehall Development, Inc., & President, Maryland Homebuilders Association;
- **Michael Powell**, Member, Gordon, Feinblatt, Rothman, Hoeffberger & Hollander, LLC, and former Principal Counsel to MDE, OAG;
- **Dusty Rood**, Principal, Rodgers Consulting;
- **Eric Schaeffer**, Executive Director, Environmental Integrity Project and former Director, Office of Civil Enforcement, U.S. EPA;

- **Larry Simns**, President, Maryland Watermen's Association; and
- **Eliza Smith Steinmeier**, Executive Director, Baltimore Harbor Waterkeeper.

Interview requests were also sent to the following individuals, who declined to participate or did not respond:

- **Jerome Blask**, General Counsel, Washington Sanitary Sewer Commission (declined);
- **Deborah Jennings**, Partner and Chair, Environmental Practice Group, DLA Piper (did not respond);
- **Kendl Philbrick**, former Secretary, MDE (unavailable); and
- **Bill Satterfield**, Executive Director, Delmarva Poultry Industry, Inc. (declined, citing "little involvement with MDE enforcement programs and actions and therefore little knowledge of most of the [interview] questions.... I am safe in saying that our members prefer a cooperative, incentive-based program to achieve environmental improvements rather than an enforcement emphasis").

CPR provided a draft copy of this report to MDE and met with MDE enforcement staff and personnel to discuss their response to the report. MDE's response is included at the end of this report. CPR met with the following MDE staff:

- **Sue Battle-McDonald**, Director, BayStat;
- **Andrew Godsen**, Lead Editor of Annual Reports;
- **Jack Bowen**, Manager, Regulatory Programs, WMA;
- **Dave Lyons**, Program Manager, Compliance Program, WMA; and
- **Terri Wilson**, Director, Office of Budget & Finance.

The findings below are a narrative synthesis of all the interviews CPR conducted in January and February 2010. The interviewees do not necessarily endorse any of the recommendations made in this report, which are the authors' alone. The interviewees also participated and spoke on their own behalf and not on behalf of the agency or organization for which they work. Interviewees are identified as follows: "official," for former and current governmental officials, "environmental," for representatives from environmental and public interest groups, and "industry," for representatives from the regulated community.

CPR asked interviewees a series of open-ended questions about MDE's enforcement program, including the role of MDE enforcement actions and citizen suits, the deterrent effect of the different types of enforcement, and recommendations for changing the enforcement program. As noted earlier, interviewees were told that their specific remarks would not be attributed to them personally.

Interviewees generally reached a consensus that resource limitations have hindered MDE's enforcement program and OAG's ability to pursue cases referred to it by MDE. They also tended to agree that criminal enforcement should be increased for particularly willful and egregious violations when a criminal law is clearly violated. Interviewees disagreed on many other issues, however, including the institutional and permitting aspects of MDE's

enforcement program, the nature of MDE's enforcement approach and actions, the role and effectiveness of citizen suits in enforcement, and the role of EPA.

### **Evaluations of MDE's Enforcement Program**

Evaluations of the reasons for weaknesses in the enforcement program fell into four broad categories: resource limitations on enforcement; institutional limitations on enforcement; permits as the basis of enforcement; and the nature of enforcement actions taken by MDE.

***All interviewees agreed that MDE should have the primary responsibility for enforcement of Clean Water Act requirements in Maryland with citizen suits and EPA taking a secondary role, if any.***

As one official said, "MDE needs to enforce the rules on the books. If there is a violation, the regulated community needs to know that the violator will be caught." Another official likened enforcement and compliance to "having a child. Children will try to push boundaries of what's acceptable or appropriate. Because [enforcement] comes down to money, businesses and even local governments will push the issue until they are caught."

When asked about the role of enforcement efforts in restoring the Chesapeake Bay, two interviewees expressed similar concerns. They both felt that the current enforcement program is limited. One industry interviewee noted that existing regulations do not cover all the sources of pollution, and the other, an official, noted that laws alone will not clean up the Bay. This person said, "Enforcement can only ensure that the law is enforced, but there will never be enough laws—nor would the public want all the laws—required to clean up the Bay."

### **Resource Limitations**

***Nearly all interviewees lamented the lack of financial resources available to MDE and empathized with existing personnel who are being asked to do more with less money.***

One industry interviewee pointed out a basic dilemma: Maryland "can't keep diverting resources and adding more statutory requirements and expect things to improve." Another complained that funding for a regulatory or assistance program often disappears as priorities change, sometimes leaving a functioning, effective program without the resources to continue. An industry interviewee said, "They're stealing from [an older] program to fund a new program because it is the flavor of the day."

Another environmental interviewee pushed back by suggesting that if MDE has no resources, the costs of compliance should be allocated to the regulated community. This interviewee noted that it does not cost MDE anything more to "hold the line until industry does all its requirements," meaning that MDE could withhold permits or permit approvals



**“That’s the single biggest change they need—more people out in the field going from place to place,”** said one industry interviewee. Another said that more inspectors would paradoxically benefit industry by allowing MDE the resources to distinguish between the good guys and the bad guys, instead of **“the tendency to overreach in the first go-round.”**

until industry comes into compliance without expending any financial resources. Another environmental interviewee said, “It doesn’t cost any more to make a good permit than a bad one.”

***A majority of interviewees also cited the need to increase both permit fees and penalties to help cover the costs of MDE’s enforcement program.***

As one environmental interviewee said, “In general penalties are pretty low and that’s a national problem. Penalties need to be predictable and regular.” Another official remarked, “Judges have enormous discretion to impose fines that are too low.” One environmental interviewee suggested that Maryland pass mandatory minimum penalty laws.

***Nearly all interviewees expressed dismay at the lack of inspectors and the lack of inspections in MDE’s enforcement program and cited a need to increase both.***

One industry interviewee observed that population growth in Maryland means an increase in pollution problems, which requires more inspectors. Another official echoed this observation, finding that reduced personnel have not been replaced and that the budget situation is “not good.” Another industry interviewee felt that a fully staffed enforcement workforce would “paradoxically” benefit the regulated community because more inspectors would allow MDE to distinguish more easily between the “good guys” and the “bad guys” instead of the “tendency to overreach in the first go-round.”

Regarding inspections, one official said that, unless MDE receives a complaint, there are “very infrequent site visits.” Site visits are an important component of the enforcement program because, as this official complained, there are “too many instances of fraudulent [discharge monitoring reports],” which cannot be discovered without site visits.

To address these problems, one industry interviewee said, “That is the single biggest change they need—more people out in the field going from place to place.” This statement was echoed by nearly every interviewee. Recognizing that the “work of agency staff is complicated and technically challenging,” one environmental interviewee suggested that MDE needs resources to “retain capable staff.” Although there “are definitely some,” MDE must have the financial ability to retain inspectors so that they “hang in there.”

### ***Institutional Limitations***

Interviewees expressed a range of opinions on the institutional challenges to enforcement, assessing in different ways the political will and leadership to enforce, the relationships between MDE and stakeholders, and the appropriateness of MDE’s mentality and attitude toward citizen suits.

***Interviewees disagreed on the political will at MDE to pursue robust enforcement policies. Industry interviewees generally thought that MDE’s current leadership is strong, while officials and environmental interviewees had more negative reactions.***

***Two interviewees found Maryland's enforcement program to be average when compared to other states.***

A few interviewees assessed the political leadership under Governor Martin O'Malley and Secretary Shari Wilson as strong. "In Maryland, we don't suffer from weak enforcement or lack of political will," said an industry interviewee. Another environmental interviewee felt that MDE is "making an honest effort at using their limited resources wisely." Most interviewees agreed that MDE's current enforcement program is a big improvement over that of Governor O'Malley's recent predecessors, Bob Ehrlich and Parris Glendening. One official noted the difference in enforcement activities between the administrations of different political parties, noting more enforcement under Democratic administrations than Republican administrations. An industry interviewee said the program has been "proactive and understandable" with a "clear uptick" in the last two to four years.

Others expressed disappointment with the current enforcement program, noting that they had higher hopes with Governor O'Malley taking office. One environmental interviewee attributed the decline in enforcement to "a problem at the top," saying that the secretary and governor "don't want enforcement against industry or agriculture or to create stronger regulations." While admitting that the lack of resources and funding and the overall budget crunch are "legitimate problems," this interviewee declared, "There is a lack of political will from the top."

At least two interviewees explicitly compared MDE's enforcement program to other states' enforcement programs. One environmental interviewee described MDE's enforcement program as "middle of the pack—slightly under par," while an official evaluated the program more positively, noting the "considerably higher" number of violations flagged for formal enforcement actions. The environmental interviewee said, "MDE's website isn't as sophisticated or ... transparent [as] other states' websites. The right-to-know shouldn't be a big issue in Maryland, and the permits and violations data should be there: easy to read and access."

One environmental interviewee remarked that Maryland has a mobile, highly educated population and lots of wealth. Its enforcement program "should be better than other states with higher poverty rates and concentrated industries that wield a lot of political clout. Maryland doesn't have the same excuses and prides itself on being very progressive. Our enforcement program doesn't match the demographics and politics of the state."

One official noted that the Chesapeake Bay is a driver for enforcement because it gives MDE and Maryland a higher profile than other regions with less famous or less historically important waterways. Yet another environmental interviewee said that the long history of Bay restoration was an obstacle to an active and vigorous enforcement program. "The Bay restoration effort has been going on for so long now, and there's a mentality that there's nothing that will help all that much, so just plug away and be satisfied."

"The Bay restoration effort has been going on for so long now, and there's a **mentality that there's nothing that will help all that much, so just plug away and be satisfied,**" said one environmental interviewee.

***Interviewees had different and contrasting opinions on MDE's relationships with the regulated community and with public interest groups and their impacts on enforcement. Both industry and environmental interviewees expressed suspicion that MDE favors the other side. Both environmental and industry interviewees recommended a more inclusive decision-making process.***

In one environmental interviewee's experience, "the bias of the permit writers is to give in to the industry." This interviewee suggested that MDE should chart a middle course between environmental groups and the regulated community so that the agency is not "caving to industry all the time." Another environmental interviewee described a meeting where MDE asked for the opinion of the regulated community on minimum standards for a permit, instead of presenting the regulated community with its own standards and soliciting input.

In contrast, other interviewees felt that public interest groups have a closer relationship with MDE than the regulated community. One official said that under Governor O'Malley and Secretary Wilson, MDE is "very sensitive to environmental groups." Another added that the relationship between MDE and the regulated community is "distrustful, not cooperative," and "very adversarial." Another industry interviewee presented a less negative evaluation, noting that MDE's relationship with the regulated community varies by site. This interviewee has never seen "a single instance of MDE letting [a polluter] off easy." Another industry interviewee described the "crystal palace effect," meaning that MDE operates "off in a separate world. If there was more open communication ... there may be clearer guidelines, [which] could lead to less infractions." And, "The more they distance themselves from the regulated community, the more ignorance there will be on both parties' parts, and greater opportunity for violations."

According to one environmental interviewee, MDE needs a reminder that "they are working for the benefit of the health of citizens and resources, not at the behest of industry stakeholders." Another environmental interviewee noted that people have low confidence in government. By taking strong action and making their enforcement presence known, MDE can increase the effectiveness of their actions. "The public isn't against enforcement, but MDE is afraid of giving Maryland an anti-business reputation. Law-abiding businesses should be happier to have a consistent playing field."

***Several interviewees described challenges posed by an institutional culture at MDE that is threatened by citizen suits.***

One environmental interviewee described an ingrained mentality that "citizen suits are a threat." Another attributed this mentality in part to recent activity by citizens to become more active, unlike in the past. This interviewee said, "The more that citizen groups participate, the more likely it is that the bureaucratic obstacles will improve." Citizen suits are discussed in further detail in the next section.



### ***The Permitting Program***

***Several interviewees across the board emphasized the need for a stronger permitting program, citing weak or unclear permits as a major source of confusion for everyone affected by enforcement and compliance efforts. A few interviewees recommended strengthening the permitting program by writing stronger permits and increasing legal review of permits by the OAG, discussed below.***

One environmental interviewee described the permitting program as the “keystone of the enforcement program” and the “teeth of the clean water restoration program.” Another industry interviewee said that weak permits are a source of frustration for both the regulated community and public interest groups. Weak permits “shield certain sectors from enforcement action.” This industry interviewee noted that permits that are not “written clearly enough to determine if a violation has occurred” are “one of the major complaints and frustrations.”

Interviewees gave similar explanations for the weakness in MDE’s permitting program: a lack of internal staff training, the lack of resources, the inability to retain skilled personnel, and the lack of input and review from the OAG. One environmental interviewee said that MDE staff “scratch their heads because they simply aren’t aware of the requirements.” Another official noted that there is currently “greater sensitivity to writing an effective permit.”

At least two industry interviewees disagreed with the general evaluation of MDE’s permitting program. One observed that the regulations and enforcement have both changed significantly over the past decade, resulting in an overall tightening of restrictions, more stringent permit requirements, and greater review of permits. The other interviewee, while allowing that permitting is “an area where [MDE] could improve,” clarified that “unclear permits are the exception and not the rule.”

An official and an environmental interviewee expressed their concerns about the permit shield defense stemming from the CWA and recommended that MDE clarify the extent of the shield. The permit shield defense arises from section 402(k) of the CWA. Under this provision, a discharger’s compliance with its NPDES permit is regarded as compliance with all of the source’s legal obligations under the Clean Water Act. In 2001, the Court of Appeals for the Fourth Circuit, to which Maryland belongs, held that discharges of pollutants not explicitly listed in the NPDES permit but “within the reasonable contemplation of the permitting authority at the time the permit was issued” were also covered by the permit shield. This ruling is troublesome because it undermines the intent of the CWA, which requires a permit for the discharge of all pollutants.

### ***The Nature of MDE's Enforcement Actions***

Interviewees also expressed opinions on different aspects of MDE's enforcement actions, including the preferred type of enforcement action; the method of MDE enforcement; the assessment of penalties; the gaps in enforcement; and the impartiality of state courts.

#### **The Type of Enforcement Action: Cooperative or Deterrent**

***Interviewees generally agreed that MDE should maintain both a cooperative and a traditional, deterrence-based enforcement program and that the form of enforcement should be tailored to the violation. A handful of interviewees said that MDE should engage in cooperative efforts to educate the regulated community about applicable regulations.***

When asked about the types of enforcement that MDE uses—informal, cooperative enforcement or formal, traditional deterrence-based enforcement—interviewees generally agreed that the type of enforcement action should depend on the nature of the violation. They said that MDE should distinguish between repeat or willful violations and first-time violators. A few environmental interviewees recommended that Maryland establish chronic violator laws that authorize higher penalties and consequences for repeat offenders. First-time violations that MDE can catch early “should be cooperatively brought into compliance.” But most felt that MDE should maintain the traditional deterrence-based approach. As one official declared, “Cooperative enforcement should not ever replace [traditional enforcement].” Another observed that MDE is doing less compliance counseling than in the past and is pursuing mandatory enforcement actions for any significant violations.

Most industry interviewees preferred cooperative enforcement and thought MDE could improve by educating the regulated community about applicable regulations. One industry interviewee said, “Most companies are ignorant and careless. You can usually fix the problem by telling them what they are doing is stupid. They are careless and not paying attention.” As an industry interviewee observed, for the most part regulated entities are inclined to comply, but there will always be a few that “thumb their nose at the law.”

#### **The Method of MDE Enforcement: Spotlights or Sweeps**

***A few interviewees criticized MDE's method of spotlight enforcement, or pursuing a few major violations rather than engaging in consistent and uniform sector sweeps.***

As one industry interviewee explained, “There's better ways to enforce.” This interviewee analogized the enforcement program to the enforcement of speed limits. “You can have lots of police who catch lots of speeders and write lots of small tickets. Or you can have a few police, catch a few speeders, and shoot them.” This analogy was echoed by at least three other industry interviewees. They expressed frustration that MDE uses the second

strategy—a few major enforcement cases with severe penalties, “an exaggerated response to a particular situation.” According to one, this strategy is “not the best way to do it.”

Some interviewees suggested that instead of focusing on a few violators and assessing large fines, MDE should pick one area and flood it with inspectors and have progressive fines for repeat violations. An environmental interviewee echoed this idea of enforcement sweeps by sector. In this interviewee’s experience, this type of sweep “tends to get a high response rate, and those who fail to respond become less sympathetic and more vulnerable to enforcement.”

***Others complained that MDE fails to take advantage of citizen suits and often acts too slowly.***

Several interviewees criticized MDE’s unwillingness to fully utilize citizen suits to supplement enforcement and relieve the agency of the burden of carrying the full enforcement load. One industry interviewee also criticized MDE for acting too slowly, citing the time delay between reporting a violation and the arrival of MDE inspectors at the site. By the time the inspectors arrive, this interviewee said, “The pollution has stopped,” adding that sometimes it feels like MDE “tips off the polluters.”

**The Assessment of Penalties**

***Some interviewees lamented the low penalties assessed by MDE and their negligible impact on deterrence.***

Among some interviewees, there is a perception that MDE sets penalties at levels that are not sufficient to create an effective deterrent to noncompliance, causing the regulated community to view those penalties as the necessary “cost of doing business,” to be regarded no differently than payroll, equipment purchase, and other ongoing costs. In response, one industry interviewee said that this mentality operates on a case-by-case basis. “There will always be a few that would rather pay the fine than pay for the upgrades.” Another industry interviewee categorically denied that regulated companies calculate MDE enforcement penalties as the cost of doing business. Considering the legal fees and the public relations impact, regulated entities “clearly never make money” from a deliberate violation.

Another industry interviewee echoed that position, finding that MDE retains a “powerful hammer” in imposing penalties. This interviewee observed that fines, stop-work orders, and bad publicity all work effectively to ensure compliance. “No one wants to be in the public eye or have work stopped.” This interviewee has seen some regulated facilities that are “extremely paranoid about compliance,” since bad publicity and MDE enforcement actions are equal “black eyes” that the regulated community strives to avoid.

“You can have lots of police who catch lots of speeders and write lots of small tickets. **Or you can have a few police, catch a few speeders, and shoot them,**” said one industry interviewee.



### The Gaps in Enforcement

***When asked which, if any, sectors MDE overlooks in its enforcement actions, responses naturally reflected the particular interests of the interviewees. However, most interviewees agreed that agriculture is an overlooked sector and that MDE should have greater authority to inspect farms.***

One industry interviewee distinguished between sectors and types of pollution problems. This interviewee did not think that any sector is overlooked, but opined that difficult pollution problems are being overlooked. A few officials echoed this opinion, citing pollution problems from facilities that are large local employers or that contribute significantly to the local economy. As one official said, “There is a reluctance to use taxpayer funds to penalize these sources.” An environmental interviewee countered that industry too often “plays the recession card,” claiming enforcement and new regulations will cost jobs.

One industry interviewee clarified that MDE does not overlook any sectors, but it is the lack of resources that prevents MDE from getting to some sectors on a timely basis. A few also expressed a desire to see enforcement efforts in proportion to a sector’s pollution contribution.

Most interviewees specified agriculture as the one sector that MDE overlooks. One environmental interviewee declared, “Agriculture is the most ridiculously unregulated and unenforced sector.” “It is ridiculous that MDA should be made the enforcers [for agriculture]—they should shift it to MDE.” This interviewee described the dynamic between MDA and MDE on CAFO enforcement as “antagonistic.” Another official also questioned the appropriateness of vesting in MDA enforcement authority over nutrient management plans, discussed earlier in the CAFO section. This interviewee felt that MDA is “not qualified to make decisions about how much nutrients can go into the Bay.”

### The Impartiality of State Courts

***At least five officials and environmental interviewees agreed that state courts were not the ideal venue to hear civil or criminal environmental enforcement actions. Some officials preferred administrative hearings, and some environmental interviewees expressed a preference for citizen suits because they are heard in federal court.***

As one official said, “State courts and judges are less knowledgeable and are more tied to their communities, meaning they are less independent. If the citizen suit alleges violations against an influential entity, bringing a case in state court can be problematic.” Another environmental interviewee observed that state courts are “somewhat hostile to intervention” by citizen groups in state court. Another is “baffled” by the state court system and said that the U.S. Attorney’s Office complains “bitterly” about the quality of state court judges. “Some cases you can’t get anywhere in state court. You need to be in federal court.”

Another official said that state court judges are “unbelievably predisposed to defendants” and “hostile to MDE.” This interviewee expressed a personal lack of confidence in the state court system, and no confidence that state courts are impartial. Officials and environmental interviewees preferred federal courts because there are higher penalties and more objective, independent judges.

One official recommended that MDE take more actions to court, rather than administratively settling them, because the penalties and judgments are greater in courts and administrative settlements are “quick and easy” for violators. This recommendation contrasted with another official, who cited the administrative courts’ deference to the agency as a significant factor in favor of administrative courts. In this person’s opinion, despite the lower administrative penalty caps and the potentially stronger message that judicial actions might send, administrative hearings may still be preferable because the administrative judges have specific knowledge about environmental regulations, are more neutral, and are more deferential to MDE than state courts.

### **The Role, Impact, and Effectiveness of Citizen Suits**

***While interviewees generally agreed on MDE’s role in enforcement, views on the role of citizen suits in enforcement were not as cohesive and, indeed, were often diametrically opposed. Nearly equal numbers of interviewees expressed support for citizen suits as an additional resource for MDE enforcement efforts as those who expressed skepticism about the value and usefulness of these suits.***

Those who favored the use of citizen suits, including environment and some government officials, described them as “a critical piece of the enforcement tool set,” a “check and balance,” and a “helpful [way to] to drive action and policy.” From prior experience, one environmental interviewee stated, “When industry realizes citizens are out there keeping watch, too, citizen suits are more effective.” Another environmental interviewee said that citizen suits are an “essential component” because enforcement resources “are always going to be strained.” Another industry interviewee expressed a more neutral view, acknowledging “there are instances where the threat of citizen suits can serve as a deterrent, but [they] shouldn’t be used arbitrarily because it wastes a lot of resources by all parties.”

One environmental interviewee suggested that MDE would be “so much better off to admit no resources,” so that it could accept the help of citizen groups without embarrassment or impacting citizens’ faith in government.

Among those who were more skeptical about the role of citizen suits, one industry interviewee likened the impact of citizen suits to “putting a grain of sand on the beach to make it bigger.” “Citizen suits are overrated as a tool for significant change.” Another industry interviewee commented that citizen suits “affect the timing [of an enforcement action] but seldom change the outcome.” This interviewee explained that a citizen suit

notice may force MDE to act faster than it would without the notice, but ultimately MDE is “not likely to take any action that it wouldn’t have taken anyway.”

***Some interviewees observed that MDE is reluctant to allow citizen suits to proceed. The perceived reasons for this stance differed. Some interviewees expressed a sense that MDE feels obligated to pursue, on its own, environmental violations brought to its attention. Others suggested an institutional mentality that citizen suits embarrass MDE because they imply that MDE is not protecting public health and the environment, as is its duty under the law.***

One official observed that traditionally MDE has not viewed citizen suits as a supplement to MDE’s enforcement efforts because, from MDE’s perspective, if the citizen suit identifies a violation and that violation is causing an environmental impact, it is MDE’s obligation to enforce the law. This interviewee added, “[MDE] won’t sit by and let citizens take the responsibility of enforcing the law.” An environmental interviewee said that the options to address citizen suits are to “deny the problem, or own the case and take over.”

Another environmental interviewee expressed a somewhat different interpretation, recounting conversations where MDE staff “said that they can’t let citizens bring lawsuits because it gives the perception that they are not doing their job.... They don’t want that message out there to lose public support.” Another described an ingrained mentality at MDE that “citizen suits are a threat.” This combined perception of embarrassment and reputation was echoed by other interviewees, who added that MDE even feels threatened by citizen suits.

Yet another environmental interviewee stated more bluntly, “The number one impediment to citizen suits being effective is the hostility [by MDE] to citizen suits.” Another had the impression that MDE has the “erroneous assumption that by going to federal court they forgo penalties awarded to the state.”

***Interviewees generally agreed that the regulated community strongly dislikes and does not support citizen suits as a means of enforcement. Opinions differed, however, regarding the impact of citizen suits on the regulated community’s behavior.***

One industry interviewee observed that industry perceives citizen suits as complicating compliance because they “make it difficult to work things out.” Having a citizen group at the negotiating table “makes the landscape more difficult,” even if the regulated facility has already agreed to certain actions to come into compliance. Another industry interviewee views citizen suits “with hostility. There aren’t any citizen groups out there that [this industry] would view as working in the joint interest of [this industry] and the Bay.” Another environmental interviewee has the impression that industry views citizen groups as “ambulance chasers” and “loose cannons filing lawsuits willy-nilly.”



Another industry interviewee said fellow colleagues perceive citizen suits as “witch hunts” and are more concerned about “being falsely accused” than they are deterred by the potential of citizen suits. They are concerned that “a layman would lay blame unnecessarily.” This interviewee “would gladly pay more taxes for the police to hand out speeding tickets” or analogously “have more MDE people handing out violations” than citizens. This interviewee distinguished between citizen groups that are truly trying to clean up the Bay and others that “are just trying to stop growth.”

***A few interviewees cited the public perception of citizen suits as obstacles to enforcement.***

One environmental interviewee observed that the public misunderstands the formal legal processes behind citizen suits and that the public perception of citizen suits is framed by industry “crying about crazy people and that these actions should be the role of the state instead.” This interviewee explained that citizen suits work by alleging facts to the best of their knowledge, and “the facts may or may not be correct, but that is how the process works.... Motions [in court] would get to the bottom of the issue.”

An official acknowledged the public perception of citizen suits as a “political tool” for public interest groups to get membership, raise their profile, or get more donations by filing “what you could call frivolous lawsuits.” Two interviewees refuted this perception. As one environmental interviewee stated, “The truth is, the risk of losing a citizen suit is so high. The only way to file is with pro bono or contingency lawyers. Groups must pay lots of fees and experts, and possibly the fees of the defense’s experts. For small public interest groups, a loss could kill them. They don’t have the luxury of filing a politically guided case.”

***Regardless of their view about the use of citizen suits in enforcement efforts, interviewees agreed that citizen suits play a useful role in bringing violations to MDE’s attention and educating the public about both regulations and behavior changes.***

Many interviewees echoed the sentiment that citizen groups can act as watchdogs and are helpful in bringing information to MDE and other state agencies. A few interviewees noted, however, that sometimes citizen groups identify violations that MDE is already pursuing, and it would be more helpful for these groups to identify smaller violations that are beyond MDE’s resources to monitor.

## **The Role of the Office of the Maryland Attorney General**

***Interviewees attributed some enforcement problems to the Office of the Attorney General (OAG), citing a lack of resources and institutional culture. Other interviewees cited the need for greater OAG review of permits before they are issued.***

Interviewees had different evaluations of the OAG. One industry interviewee said, “The Attorney General has done a lot of enforcement public relations, but they don’t have the

resources to carry out their mandate.” Another official had the impression that lawyers in the OAG “don’t like going to court.” This interviewee criticized the quality of the legal work and found that cases “weren’t always pursued as diligently as they could’ve been.”

At least two interviewees emphasized the need for the OAG to review permits for legal issues before they are issued. According to one environmental interviewee, “the OAG seems surprised when issues of legality are raised.” Another environmental interviewee commented that if the OAG is “going to have to defend state decisions, they need to have a more active role in reviewing the legality of permits.” This interviewee acknowledged that the OAG cannot review every permit but that “some are getting through that are clearly illegal.”

This perspective was refuted by one official, who explained that some groups may feel that “MDE’s permits aren’t as environmentally protective as they could be, but the permits are legally sustainable. It’s not the OAG’s role to say to MDE, ‘Be tougher.’”

### **The Role of Criminal Enforcement**

***Nearly every participant thought that MDE and the OAG should pursue criminal enforcement actions when a discharger has committed a willful or flagrant violation of the law. Opinions as to the effectiveness of criminal enforcement actions in achieving deterrence varied. Some interviewees said that more criminal actions would send a clear message. Others had difficulty evaluating the deterrent effect of such actions when cases are so difficult to establish and civil penalties are much higher than they are in criminal cases.***

Interviewees’ opinions on criminal enforcement actions were fairly similar: “Criminal action should be used in major violations and where there is absolutely no effort to comply, or even where there is an effort to comply if the magnitude of the violation warrants.”

However, evaluations of the current criminal enforcement program differed. One environmental interviewee said, “Currently there is no criminal enforcement to speak of,” and the cases brought today are “petty, and no comparison to the caliber of cases brought years ago.” An industry interviewee disagreed, finding that generally MDE and the OAG do a “pretty good job.” An environmental interviewee echoed this opinion and added that the OAG has worked with public interest groups to train them to spot criminal activities. This interviewee added that the OAG seems willing to work with citizens and to bring actions, but it is “even more resource-strapped than MDE” and not necessarily lacking in political will. Others concurred with the lack of resources at the Environmental Crimes Unit.

At least half of the interviewees of different backgrounds agreed that criminal enforcement actions should be increased. However, one industry interviewee feared “that through draconian measures, criminal penalties could apply to those that violate out of ignorance, and not flagrant violation of the rules.”

Other interviewees expressed doubts on the effectiveness of criminal enforcement. “Criminal cases are hard to use to build a deterrence-based program. Opportunities are hard to uncover and require a high level of proof.” An industry interviewee added that “people have become more sophisticated” and “think they can get away with it,” finding that environmental crimes tend to be done by small-time operators, involving lead or asbestos removal. “Big companies do the equation; they don’t want to go to jail.” An official found it difficult to “evaluate the deterrence impact of a million dollar civil penalty versus a \$20,000 criminal fine.”

Among those most supportive of increased criminal enforcement actions were two environmental interviewees who said that criminal enforcement actions should make up only a small part, perhaps 1 percent, of enforcement actions. Others noted additional obstacles to establishing successful criminal cases, including the difficulty of proving criminal intent. In addition, “most juries are reluctant to prosecute unless they know that the person was aware of their conduct and had specific intent.” One environmental interviewee observed a reluctance of state courts to view environmental crimes as the same as other, more typical crimes such as robbery. In one instance, “the judge was very uncomfortable listening to [an environmental] case after hearing a case about cigarette theft.”

## The Role of the Environmental Protection Agency

***Interviewees generally characterized the relationship between MDE and EPA as difficult. Many saw room for EPA to contribute to state resources or to assist with permit review, but most agreed that MDE would push back—out of fear or hostility—against federal involvement with its enforcement program.***

Interviewees cited similar reasons for MDE and EPA’s difficult relationship, including MDE’s concerns about its authority “to make the calls,” its fear that EPA will take away its delegation, and its general territoriality over “the sexy cases.” One environmental interviewee characterized the situation as one in which “MDE is afraid to work with EPA on greater penalties,” even though the chances of success are much higher in federal court.

One industry interviewee “strongly opposed” EPA involvement, citing strong laws in Maryland. This person said, “The folks at MDE live with their constituents—EPA doesn’t.”

When asked about what role EPA could play, interviewees cited greater oversight, consultation, and funding. Others cited assistance with particular sectors like agriculture and stormwater where Maryland “won’t have the ability or political will to do the job.”

“The folks at MDE live with their constituents—EPA doesn’t,” said one industry interviewee.



## Recommendations

This report highlights a series of fundamental weaknesses in the enforcement of Clean Water Act requirements in Maryland. Foremost is the serious decline in resources over the past 10 years, and the ultimate lack of financial resources to fill all inspector positions at MDE and to hire additional enforcement personnel to monitor the nearly 55,000 permits in effect. Even without additional financial resources, however, MDE could nonetheless craft an effective enforcement program. This section offers three sets of recommendations to improve MDE's enforcement program: overall recommendations; improvements with existing funds; and improvements with additional funds.

### Overarching Recommendations

#### *Funding*

The need for greater funding is clear: more work is expected of MDE, but less money is given to the agency to do it. The budget for the WMA enforcement workforce declined by 25 percent between 2000 and 2009 and the number of active, full-time inspectors decreased by 12 percent while the number of permits in effect for the entire WMA program tripled. Meanwhile, during the interviews, stakeholders from different backgrounds reached a surprising consensus, repeatedly citing the need for more inspectors and more inspections on the ground. Environmental groups felt that more inspectors would reveal more violations, while industry interviewees felt that more inspectors would reveal that other industrial sectors are to blame for ongoing violations and pollution. Both sides agreed that more inspectors are necessary to develop a steady, judicious, systematic, and fair enforcement program.

Increased funding could be obtained from more stringent and well-crafted penalties and legislative authorizations for increases in base funding, permitting fees, and penalties.

- **MDE should seek to recoup the economic benefit achieved by noncompliance from all defendants in an enforcement action.**

Currently, penalty considerations under Maryland law are limited to addressing the harm caused by the violation. However, effective deterrent-based penalties consist of two parts: one part to address the harm and another to eliminate any economic benefit derived by the violator from the violation. MDE's failure to recoup this latter part effectively undermines the enforcement program's ability to deter future violations, especially considering MDE's low penalty assessments. Enforcement works when all regulated entities are required to abide by the same laws, and none gains a financial advantage by violating those laws. By simply focusing on recouping the cost of the environmental harm or the cost of environmental clean up, regulated entities may perceive, if they do not already, penalties as the "cost of doing busi-

ness,” deducted from the overall profit. This result is exactly what the traditional “rational actor” model for explaining compliance-related behavior predicts for a weak enforcement regime.

EPA’s penalty calculation uses a calculation model called BEN to compute the economic benefit to a violator from delaying or avoiding necessary pollution control measures. MDE should apply this or a similar model in its penalty calculations.

- **The Maryland General Assembly should increase basic funding levels for MDE and then index those increased levels to the rate of inflation to ensure steady funding levels.**

A well-funded enforcement program should have sufficient funds to support a relatively stable amount of enforcement activities, normal contingencies, and broader enforcement objectives and goals. At best, MDE should have the resources to address an increasingly complex and challenging universe of pollutants. In MDE’s annual enforcement and compliance reports, MDE explains that in certain years wet weather events caused a diversion of resources from one program to another so that MDE inspectors could address each overflow report. A well-funded agency should be able to plan for normal contingencies without having to stretch resources so thinly.

- **The Maryland General Assembly should authorize an increase in permitting fees to ensure that the fees cover the basic cost of program administration. The legislature should also authorize increased penalties for violations and should establish mandatory minimum penalties that are not subject to MDE discretion.**

In 2007, the Transition report found that more than two-thirds of the permit and license fees charged by each department have not been increased in more than 10 years. Discharge permit fees in Maryland should be “based on the anticipated cost of program activities related to management of discharge to waters of this State.” For example, the fees for a surface water discharge permit were last raised in 1993. At the very least, permit fees could be raised in accordance with inflation rates since 1993.

Similarly, maximum civil and administrative penalties in Maryland could also be adjusted for inflation as the EPA has done. Table 1 shows that EPA’s maximum civil penalty is now \$37,500, whereas Maryland’s maximum penalty for CWA violations is \$10,000, the level at which it was enacted.

Both governmental and environmental interviewees complained repeatedly that MDE and state court judges have too much discretion in determining the size of penalties, resulting in low penalties that have little deterrent impact. One governmental interviewee cited an example of a criminal enforcement action in which the

state court judge gave the defendant a \$20 fine. Overall, the low average penalty amounts indicate that MDE and the OAG are seeking or settling for low penalties.

One way to address this problem is for the Maryland legislature to establish a mandatory minimum penalty (MMP). A report by the Texas Public Interest Research Group found that MMPs were effective enforcement tools, contributing in New Jersey to 87-percent and 50-percent decreases, respectively, in pollution discharge violations and reporting violations. Effective MMPs are characterized by clear definitions of all CWA violations, including pollution discharge and reporting violations; penalty levels that deter the wealthiest polluters but are fair to small businesses; authorizations for delegated authorities to assess penalties; and prompt assessment and prompt payment. For example, New Jersey's MMP classifies dischargers as either "serious violators" or "significant non-compliers," and the mandatory minimum is \$1,000 and \$5,000, respectively. Reporting violations are \$100 per day for each omission, with a maximum penalty of \$50,000 per month.

### ***Enforcement Program Design***

As discussed earlier, an effective enforcement program may combine both cooperative and deterrence-based approaches, but ultimately the deterrence-based component appears to effect the most compliance with CWA and state water quality laws. A deterrence-based enforcement program consists of four essential elements: compliance monitoring, timely initiation of enforcement actions; a mandate to comply; and imposition of adequate penalties. Both the data review of MDE's annual enforcement and compliance reports and the interviews for this report revealed that MDE's enforcement program falls short of an effective program design.

- **MDE must stop relying on paper reviews of DMRs as the primary way to set priorities for physical, on-site inspections.**

Many interviewees with different interests expressed the need for more inspectors and more on-site inspections than MDE currently conducts. At least two officials pointed out the problem with relying on DMRs: "you have to trust what you get" but "there are too many incidents of fraudulent DMRs. Inspectors find visible violations." MDE's Compliance Program explicitly notes its reliance on DMR reviews.

MDE currently prioritizes permittees based on their risk to the environment and human health and ranks them according to factors such as the nature of the operation, compliance history, and location of the facility. High-risk permittees are more likely to be physically inspected. However, MDE should establish an enforcement program with routine inspections for as many permittees as possible.



If MDE continues to rely heavily on paper reviews, it should assess stiff penalties for reporting violations so that regulated entities have every incentive to truthfully report pollutant discharges.

- **MDE and the OAG should ensure that permits are legally defensible and meet the statutorily required standards of protectiveness. MDE should also clarify the extent to which the permit defense shield applies in Maryland.**

Enforcement of CWA requirements starts, most basically, with the NPDES pollution discharge permit issued to each regulated entity. Clearly written permits benefit all stakeholders: the regulated entity, by clearly stating what is and is not permitted, and the public, by establishing clear standards by which to judge a violation. Unfortunately, during the interviews, a common complaint that emerged was that MDE issues permits that are unclear and confusing or that fail to meet minimum legal requirements. Because MDE's legal counsel will eventually be required to defend the permits, the OAG should take a greater role in reviewing permits before they are issued. This preemptive action may reduce the resources later needed to defend permits or prosecute permit violations. As one environmental interviewee noted, "It doesn't cost any more to write a good permit than a bad one!"

In addition, MDE should clarify the extent of the permit shield defense as it applies in Maryland. Among the possible options, MDE could identify key pollutants that it identifies as harmful and set permit limits for discharges of those pollutants above certain amounts. This approach would divest permit-issuing officials of some discretion to determine which pollutants merit limits, but it would relieve the agency of the responsibility of deciding on a case-by-case basis which pollutants are sufficiently harmful to require limits. It would also provide a baseline level of permit controls needed to protect the state's aquatic ecosystems. Alternatively, MDE could identify key pollutants and require permit applicants to disclose in their permits applications the amounts of those pollutants they plan to discharge. Such disclosure would allow MDE to use its informed discretion to determine whether to impose limits and, if so, what those limits should be. Discharge of a listed pollutant without prior disclosure in the permit would constitute a violation, and perhaps even trigger the severe penalties that MDE invokes for willful violations.

- **The Maryland General Assembly should increase maximum penalty amounts for violations of CWA NPDES permits.**

Currently, the Clean Water Act authorizes a maximum civil penalty of \$37,500 for NPDES violations, whereas Maryland law authorizes a maximum civil penalty of \$10,000 for the same violations. The General Assembly should authorize a maximum civil penalty that is comparable to the federal maximum.

- **MDE should not settle for penalties that fail to deter dischargers from violating the applicable laws and regulations.**

As noted earlier, between 2000 and 2009 MDE's average penalty settlement was far below the maximum amount authorized under the CWA and Maryland law. Coupled with the relative paucity of inspections, dischargers in Maryland have little reason to think that they will be caught and, even if caught, that they will be meaningfully penalized.

- **MDE should reevaluate the balance of judicial enforcement actions and administrative enforcement actions and carefully consider which route is better, based on factors such as the difference in maximum available penalties or past experience with similar cases or in similar venues. MDE should also consider allowing citizen suits to proceed in federal court to maximize penalty recovery and the deterrent effect from strong penalties.**

During the interviews, both officials and environmental interviewees described their perceptions of a strong bias in favor of defendants in state courts and the difficulty of obtaining a fair trial. MDE should consider this bias when deciding what type of enforcement action to pursue, either in state court or through the Maryland Office of Administrative Hearings. MDE should also consider this bias in conjunction with whether to over-file citizen suits or to let them proceed in federal court.

- **MDE should provide complete information in its annual enforcement and compliance reports that is necessary for the public to assess the scope and effectiveness of the agency's enforcement program.**

While the annual Enforcement and Compliance Reports provide great insight into MDE's enforcement program, the reports could be improved by ensuring consistent counting methods and including all enforcement activities. Consistent counting methods would allow the public to fairly compare MDE's enforcement efforts in different years. Including all enforcement activities would allow the public to see what additional measures are being taken to ensure compliance with the CWA and may even benefit MDE by revealing a great deal more enforcement than currently appears in the available data. At a minimum, this information would give a more detailed and holistic view of all enforcement efforts in Maryland. For example, MDE could include:

- Information on SEPs, including monitoring efforts and evaluations on their effectiveness;
- Information on repeat violations at previously cited facilities or repeat violators; and
- Information on enforcement activities undertaken by locally delegated authorities.

### **Citizen Suits**

Citizen suits are an integral and established part of most federal environmental laws and enforcement programs. They represent an explicit congressional recognition that citizens have a role to play in enforcement because they and their organizations are able and have information and resources to monitor local dischargers that MDE may not. MDE seems to afford inadequate weight to the use of citizen suits as a tool to supplement enforcement.

- **MDE should permit, on a case-by-case basis, citizen suits to proceed in federal court as an established supplementary enforcement mechanism. MDE should also work with citizens groups and EPA to channel cases through federal court to get higher penalties where appropriate.**

In determining whether or not to over-file citizen suits—thus effectively preventing them from proceeding—MDE should consider a variety of factors, including: the availability of resources to pursue a violation alleged in a citizen suit; whether or not active enforcement action has already been commenced by MDE, or whether the suit prompts initiation of an enforcement action; the nature and profile of the alleged violator; whether allowing the suit to proceed in federal court may be better than an action by MDE in state court; and the availability of relief or penalty recovery.

MDE retains every right to preempt citizen suits that are brought to its attention by initiating and diligently prosecuting its own enforcement actions. However, many environmental interviewees expressed frustration with the inability to pursue any federal actions and the inability to participate as an intervener in subsequent MDE actions.

### **Improvements with Existing Limited Resources**

This report confirms a longstanding problem with MDE's lack of resources and its impact on enforcement. Clearly, as recommended above, MDE's enforcement program would improve dramatically with adequate numbers of inspectors and more on-site inspections, but MDE can also make a number of improvements even if resources do not increase.

- **MDE should conduct an analysis of the most significant causes of Bay pollution and select and inspect on an annual basis the largest dischargers or a random sample of discharges in sectors with multiple small dischargers.**

Paper reviews of DMRs are an important part of any enforcement program, but on-site inspections are crucial. They reveal violations that are omitted, not evident, or concealed in self-reports and enable MDE to better and realistically understand what actions to enhance compliance are and are not being taken by regulated entities. As part of a targeted, focused enforcement program, MDE should also pursue a small number of cases to the hilt.



- **MDE should develop and clearly communicate its enforcement priorities to the regulated community and to the public and widely and publicly advertise successful, tough enforcement actions.**

One of the most important actions MDE and the political leadership in Maryland can take is to throw its support behind a strong, vigorous enforcement program. Especially in times when budgets are tight, political support is a powerful resource that can help maintain the morale of the enforcement staff and communicate to the regulated community that violations will be pursued.

While MDE advertises its enforcement actions on its website, the agency should try to reach a wider public audience by reaching out to local media for coverage of enforcement actions in the relevant local newspapers and broadcast outlets.

- **Internally, MDE should foster a culture that is supportive of enforcement.**

MDE, like all enforcement authorities, often occupies an unenviable position: the middle. It may receive pressure from the political leadership or other state agencies to pursue or ignore certain cases or sectors; it must interact frequently with the regulated community, which has its own interests in enforcement; and it is the focal point of frustration from vigilant and vocal environmental organizations. Given those pressures and the bleak budget situation, it is not difficult to imagine that MDE's enforcement workforce is beleaguered, demoralized, and reluctant to take a step in any direction for fear of drawing the ire of some stakeholder.

To foster an internal agency culture that emphasizes enforcement, MDE leadership should continue to demonstrate in words and action that it is committed to enforcing the Clean Water Act as written and intended by Congress. In addition, MDE is filled with committed, dedicated, and professional enforcement staff, many of whom could take stronger leadership roles in enforcement and advocate for more stringent penalties or enforcement actions. MDE should encourage its enforcement personnel to take on this role. MDE should also provide incentives to maintain staff morale, including higher pay grades, promotions, and opportunities for continuing professional or advanced education.

### **Improvements with Additional Funds**

MDE's enforcement program could be better funded if it followed the model of the most advanced federal programs, which tend to be more aggressive about collecting penalties that are then channeled back into enforcement. An annual budget appropriation from the Maryland legislature is still necessary to provide the foundation of the program, but an effective restructuring of the enforcement program could render it self-supporting. With more financial resources, MDE could increase its enforcement program in a number of ways:

- **MDE should inspect at the frequency specified by Maryland law and EPA guidelines.**

In 2007, EPA issued inspection frequency goals for the core NPDES programs, as well as wet weather sources of pollutant discharges.<sup>10</sup> For example, as MDE begins to develop an enforcement program for the new CAFO permit, it should note that EPA guidelines recommend a 20-percent inspection coverage rate for large CAFOs, or an inspection at least once every five years. For construction sites, the guidance recommends a 10-percent inspection rate for sites larger than five acres and a 5-percent inspection rate for sites between one and five acres. MDE's existing annual reports do not break down inspection information this specifically, so it cannot be determined if MDE is meeting these goals.

In addition, Maryland law specifies some inspection frequencies. Under Maryland law construction sites with approved erosion and sediment control plans must be inspected on the average of every two weeks. MDE's annual reports freely concede inadequate inspections. With additional financial resources, MDE should strive to meet EPA's and its own goals for inspection frequencies.

- **MDE should address as many violations as possible with formal civil and criminal enforcement actions.**

The nature of the enforcement actions, deterrent-based or cooperative, impacts the overall effectiveness of any enforcement program. The rational regulated entity model appears to support the conclusion that deterrence-based actions are more likely to ensure lasting and long-term compliance than would result from primary reliance on cooperative-based enforcement tools. However, MDE should also consider the nature of the violation in determining which enforcement approach to apply. First-time violators that self-report violations, for example, may warrant a cooperative enforcement approach, while repeat or willful first-time violators should be subject to a strong deterrence-based approach.

- **The OAG should increase its staff seated at MDE to process enforcement actions in a timely manner.**

As of March 2010, MDE is represented by a staff of 24 attorneys from the OAG. These attorneys are responsible for an enormous amount of cases. While these attorneys report to the Attorney General, their positions are located within MDE's budget. With additional funding, MDE should allocate a larger portion of its budget to hire the additional staff necessary to meet the enforcement caseload.

- **MDE should reach out to citizens who live near regulated facilities to encourage and educate them to monitor instances of noncompliance.**

With more funding, MDE could enlist citizens to assist with compliance monitoring by teaching them how to identify violations to bring to MDE's attention. One environmental interviewee commended past efforts by the Environmental Crimes Unit to reach out to citizens groups in this way. MDE could extend and broaden this outreach to assist with its monitoring efforts.



## Future Research

This report provides a detailed look at MDE's enforcement program for CWA requirements. However, many other questions remain unanswered and would benefit from future research, including:

- **The average caseload for an inspector or legal counsel.** This report identifies an average 1,184 permits in effect per inspector in the WMA and approximately 24 staff attorneys seated at MDE. It is unclear, however, what a reasonable caseload for either an inspector or an attorney would be. In California, Delaware, Illinois, and North Carolina, the average number of permits per inspector is 120. However, it is difficult to compare this number with MDE because in those states the enforcement data are specific to NPDES permits only, whereas MDE's information represents the entire WMA program.
- **The trigger for an onsite inspection.** With limited resources, MDE can only inspect a limited number of facilities and permittees. It would be useful to understand how MDE selects sites for onsite inspections.
- **The amount of money lost from not recovering the violator's benefit from noncompliance.** EPA's penalty policy includes a calculation to recover the violator's economic benefit from noncompliance, which MDE does not include. The failure to recover this benefit undermines effective deterrence. An illuminating future research question may be to attempt to calculate the amount lost by failure to recover this benefit over the past decade.
- **The number of citizen suits overfiled.** MDE should release information about how many citizen suits it has overfiled, and the outcome of those cases compared to what the citizen suits sought. This information could help determine if and when MDE should simply allow citizen suits to proceed to maximize penalty recovery and deterrent effect.
- **The number of facilities that, after notice of a violation, come into compliance within 60 days.** This information would indicate in part the effectiveness of MDE's enforcement program as a reflection of how seriously a facility regards potential formal enforcement action.
- **The enforcement activities conducted by locally delegated authorities.** Although including these activities is a recommendation made in the report, it is worth reemphasizing the need for this information and conducting an analysis of these enforcement activities. The bulk of pretreatment programs are delegated to local governments, which may be more easily influenced by economically powerful interests and thus have less incentive to enforce strictly against polluters.
- **The enforcement programs in other Bay States.** While Maryland has a significant role to play in Bay restoration, the other Bay States, especially Pennsylvania and Virginia, contribute significant amounts of pollution as well. An important area of

future research, therefore, would be to conduct similar evaluations of the enforcement programs in those states.

## Conclusion

Maryland has long prided itself on being an environmental leader in the Chesapeake Bay region, but that pride must come under scrutiny in light of MDE's enforcement program. While it is crucial for legislatures and agencies to adopt sufficiently protective environmental laws, those laws will have little impact if they are not vigorously enforced. MDE's enforcement efforts are squeezed to the edge of ineffectiveness by an increasingly tight budget and a poorly designed program that fails to maximize its deterrent impact. When inspectors are scarce and on-site inspections even scarcer, the regulated community internalizes a cavalier attitude that violations will not be discovered. Even if they are discovered, violators can rest assured that penalties will likely remain low. From the outset, these two important components of an effective deterrence-based enforcement program—consistent monitoring and deterrent penalties—are undermined. Worse, citizen suits are unable to backstop deficiencies in the government's enforcement program as a result of MDE's reluctance—if not outright hostility—to allowing these suits to proceed.

While MDE's budget woes are pervasive, MDE can still muster the political resources to redesign its enforcement program on a limited budget. Strong leadership, dedicated focus to certain sectors, and tougher penalties are all steps that do not require additional resources. If the goal is cleaner waters in Maryland and ultimately a restored Chesapeake Bay, the Maryland Department of the Environment must forcefully and publicly rededicate its commitment to enforcement.



## Endnotes

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- 2 GAO Report, GAO-07-883, *EPA-State Enforcement Partnership Has Improved, but EPA's Oversight Needs Further Enhancement* (July 2007), <http://www.gao.gov/new.items/d07883.pdf>.
- 3 The citizen suit provisions also authorize suits against EPA for failure to fulfill its nondiscretionary statutory duties. This aspect of the citizen suit provision is not the focus of this report.
- 4 33 U.C.S. § 1365 (2010).
- 5 James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 30 (2003).
- 6 *Id.*
- 7 Without separating these forms of inspection, the inspection coverage rates would have been 21 percent and 13 percent, respectively, for FY 2008 and FY 2009.
- 8 Maryland Department of Environment, FY 2008 Annual Enforcement and Compliance Report 18 (2009), [http://www.mde.state.md.us/assets/document/AboutMDE/enf\\_comp\\_08.pdf](http://www.mde.state.md.us/assets/document/AboutMDE/enf_comp_08.pdf).
- 9 *New York v. U.S. E.P.A.*, 413 F.3d 3 (D.C. Cir. 2005).
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## About the Authors



**Robert L. Glicksman** is the J.B. and Maurice C. Shapiro Professor of Environmental Law at the George Washington University School of Law. He is a nationally and internationally recognized expert on environmental, natural resources, and administrative law issues. Professor Glicksman previously taught at the University of Kansas School of Law, where he was the Robert W. Wagstaff Distinguished Professor of Law. He is the author of two casebooks on environmental, natural resources, and administrative law; and dozens of articles and book chapters on these topics. Professor Glicksman's recent research on Clean Water Act enforcement includes three co-authored law review articles and an upcoming book on enforcement of the Clean Water Act nationwide, *Pollution Limits and Polluters' Efforts to Comply: The Role of Government Monitoring and Enforcement* (Stanford University Press) (with Dietrich Earnhart).



**Yee Huang** is a Policy Analyst with the Center for Progressive Reform. She graduated *cum laude* from Rice University with a B.A. in biology and received a Rotary Ambassadorial Scholarship to study international law at the University of Kent in Brussels, Belgium, where she received an L.L.M. with distinction. Ms. Huang received her J.D. *cum laude* from the University of Florida Levin College of Law. During law school, she published articles in the *University of Denver Water Law Review*, the *Florida Journal of International Law*, and the *Cardozo Law Review*.

## Appendix A: Response from MDE

**MARYLAND DEPARTMENT OF THE ENVIRONMENT**

1800 Washington Boulevard • Baltimore MD 21230  
410-537-3000 • 1-800-633-6101

Martin O'Malley  
Governor

Anthony G. Brown  
Lieutenant Governor

Shari T. Wilson  
Secretary

Robert M. Summers, Ph.D.  
Deputy Secretary

March 25, 2010

Ms. Shana Jones  
Executive Director  
Center for Progressive Reform  
455 Massachusetts Avenue, NW #150-513  
Washington, DC 20001

Dear Ms. Jones:

The Maryland Department of the Environment (MDE) shares the authors' appreciation for the importance of a robust enforcement regime, and welcomes this chance to comment on the draft report and to provide updated information about the Department's enforcement approach and activities.

While the Department generally agrees with the draft report's analysis of the funding shortfall, the report does not accurately reflect the last three years of MDE enforcement activity. Below is a summary of changes and progress made in recent years relating to enforcement and fiscal structure. Following that are comments on the draft report's assessments of program design and of MDE's approach to citizen suits. These comments address selected areas of particular concern and are not intended to be a comprehensive review of the draft report.

### Progress 2007-09

Enhanced enforcement and improved fiscal structure were two of the three top operational priorities identified by MDE in 2007.

#### *Fiscal Structure*

In 2007, MDE conducted a thorough review of ten years' of revenue and expenditure data and the Department's statutory mandates, programs, and resources to assess the Department's fiscal health. This 2007 Fiscal Analysis and the most recent 2010 Update are posted online\* and document the Department's significant shortfall in budget and positions. Over the past two years, the Department has implemented several recommendations from the study, including prioritizing activities and functions, eliminating low-priority functions, realigning fund sources, and three fee increases.

\*[http://www.mde.maryland.gov/assets/document/fap\\_final\\_report\\_update\\_jan2010.pdf](http://www.mde.maryland.gov/assets/document/fap_final_report_update_jan2010.pdf)



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Ms. Shana Jones  
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#### *Enforcement*

MDE's approach to enforcement has also changed significantly since early 2007.

- The number of enforcement actions taken annually by MDE increased 44% from FY07 to FY09. The following actions contributed to this increase:
  - To address overdue enforcement actions, MDE established a Standard Enforcement Procedure in 2007 that ensures consistency and timeliness in enforcement actions. It requires that enforcement activity for significant violations begin within 90 days of the violation date. This Standard Enforcement Procedure went into effect in early FY08.
  - The Department's MDEStat management accountability program was established in 2007 and focused on implementation of the new Enforcement Procedure as its first priority. Each MDE administration is reviewed monthly at MDEStat meetings, and any enforcement cases overdue for processing are identified and discussed.
  - Through diligent effort by program staff and consistent oversight by MDEStat, the backlog of CWA enforcement actions to be referred for legal action has been eliminated.
- The draft report accurately reflects the large number of cases awaiting administrative or civil action in the Attorney General's Office. The Water Management Administration's Compliance Program has referred 701 cases to the Attorney General's Office in the last two years, implementing the updated MDE and Program Enforcement Procedures described above.
- In January 2009, MDE implemented a consistent enforcement approach for sanitary sewer overflows (SSOs) by assessing a penalty for each and every event (unless the responsible party can demonstrate to MDE's satisfaction that the SSO was beyond its control or is already paying stipulated penalties for SSOs under a consent order).

#### Program Design

- The draft report asserts that MDE's approach to CWA compliance is based largely on "paper reviews," referring to reviews of facility-supplied Discharge Monitoring Reports, or DMRs, to determine compliance. The draft report further notes the apparently-high percentage of MDE compliance reviews that are "paper reviews." In fact, the number of facilities audited by DMR reviews only is smaller than the number evaluated by on-site inspections. In FY08 there were 2,311 total sites evaluated; of those, 1,544 sites were inspected (67%). In FY09 1,711 sites were evaluated, of those 1,385 sites were inspected (81%). This illustrates that the majority of evaluations involve on-site inspections.
- MDE does not share the view that partial reliance on DMR reviews amounts to inadequate oversight. The Department regularly performs quality assurance verification on DMRs to ensure accuracy. This verification includes reviews of on-site records and assessments of contract laboratories to ensure that standard analytical methods are being followed.



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**Citizen Suits**

- MDE considers the facts presented in each citizen suit notice and decides the best course of action in light of priority based on protection of public health and the environment.
- MDE does not "block" citizen suits (draft report, p. 7) but does file enforcement actions when appropriate. Contrary to the report's claim that MDE "denies citizens the opportunity to participate" in enforcement actions when MDE "takes over the case," over the last two years, MDE has filed an enforcement action and preempted a citizen suit only once in response to a Notice of Intent. The last time citizens sought to intervene in a State enforcement action, MDE actively supported their effort by filing a motion with the court in support of intervention.
- MDE encourages citizen participation in a grant-funded MDE Enforcement Volunteer Corps that is helping review required records under the General Permit for Construction Activity, enabling enforcement actions to be taken for identified violations.

Again, we appreciate your interest in CWA enforcement and the opportunity to comment on the draft report. If you would like to discuss this further, please contact me or Sue Battle-McDonald, MDEStat Director, at 410-537-4111 or [sbattle-mcdonald@mde.state.md.us](mailto:sbattle-mcdonald@mde.state.md.us).

Sincerely,



Shari T. Wilson  
Secretary

cc: Dr. Bob Summers, Deputy Secretary  
Sue Battle-McDonald, MDEStat Director  
Jay Sakai, Director, Water Management Administration  
Jack Bowen, Water Management Administration



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## Appendix B: Response from CPR



March 29, 2010

### Board of Directors

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Robert Glicksman  
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Catherine O'Neill  
Amy Sinden  
Sidney Shapiro  
Rena Steinzor

Via Facsimile 410-537-3888

Secretary Shari Wilson  
Maryland Department of the Environment  
1800 Washington Boulevard  
Baltimore, Maryland 21230

### Advisory Council

Patricia Bauman  
Frances Beinecke  
W. Thompson Comerford, Jr.  
Robert Kuttner  
John Podesta  
James E. Tierney  
Henry Waxman

Dear Secretary Wilson:

Thank you for taking the time to respond to our report. We write to clarify two specific points made in your letter.

The first regards our assessment that MDE relies largely on reviews of Discharge Monitoring Reports complete by plant owners and operators, or "paper reviews," rather than on-site inspections, to determine compliance. You note that "the majority of evaluations involve on-site inspections," citing as an example that "in FY09 1,711 sites were evaluated, of those 1,385 sites were inspected (81%)." According to MDE's 2009 enforcement report, 13,677 permits were in effect for municipal and industrial dischargers. The 1,385 on-site inspections in 2009 is a "coverage" rate of 10 percent of the 13,677 permitted dischargers, as MDE itself noted in its 2009 enforcement report.

Moreover, the 2009 report distinguishes between unique sites evaluated for compliance and the overall number of compliance activities. With respect to the overall number of compliance activities, the 2009 report supports our assessment that MDE relies largely on paper audits rather than on-site inspections. In 2009, under the Surface Water (Municipal & Industrial) State and NPDES permits, the total number of inspections and spot checks was 3,120, and the total number of audits was 5,929. The report defines an audit as "a review of records, self-monitoring reports performed off site at MDE offices." Thus, in 2009 there were nearly twice as many paper reviews as on-site reviews, consistent with our assessment. The 2009 report even explicitly states, on page 18, that "much of compliance is determined by record reviews rather than physical inspections."

The second observation relates to your statement that, "over the last two years, MDE has filed an enforcement action and preempted a citizen suit only once in response to a Notice of Intent." When we discussed these issues with your staff on March 22, 2010, we asked for information regarding MDE's policies toward overfiling and citizen suits. Your staff said no systematic data or policy statements were available. We are therefore puzzled how you derived this figure. We would also note that citizen groups and their attorneys have consistently complained about MDE entering into a consent decree with the polluter prior to the 60-day "overfiling" deadline, thus effectively ending the citizen suit. Your assertion that only one enforcement action was actually filed in the last two years sidesteps this concern, leading us to surmise that the total number of citizen suits ended by MDE action may in fact be higher.

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As you know from reviewing the report, citizen groups and the attorneys who represent them are uniformly troubled by MDE's attitude toward and interference with citizens' suits, causing a major rift between the agency and one of its most important constituencies. Without more systematic and well-documented data, we do not think you will be able to reach a better understanding with these stakeholders.

Again, we appreciate your response to our report.

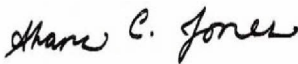
Sincerely,



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## Appendix C: MDE Rebuttal

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SecretaryRobert M. Summers, Ph.D.  
Deputy Secretary

March 31, 2010

Ms. Shana Jones  
Executive Director  
Center for Progressive Reform  
455 Massachusetts Avenue, NW #150-513  
Washington, DC 20001

Dear Ms. Jones:

Thank you for your letter of March 29, 2010. The Department appreciates the opportunity to further clarify the two points in question.

The "81%" figure MDE offered in our comments did not pertain to the coverage rate of the universe of permitted facilities. We acknowledge we do not have the resources to inspect the universe. Rather, we were referring to the 1711 sites we were able to evaluate by site inspection and audit. Of the 1711 sites we evaluated, site inspections were conducted on 81% or 1385 facilities and 326 facilities were evaluated only by paper audits.

In the second paragraph, the number of inspections and the number of audits you reference are from the 2008, not 2009 Annual Report. Your point in referencing the numbers relates to the measure of compliance activity. As our staff discussed, many facilities are required to submit DMRs quarterly, and some monthly, by the discharge permit requirements. The review of DMRs and site inspections compliment each other in the determination of significant violations. Annual inspections of major facilities and DMR reviews are required under our EPA delegation, Enforcement Agreement with Region III, and grant commitments.

Recognizing that facilities required to submit DMRs must do so multiple times each year, the 7603 audits recorded for 2009 divided only for quarterly reports is roughly 1900 facilities. Factoring in some that have monthly reporting requirements, the number of facilities audited is on par with 1711 sites the 2009 Annual Report shows we evaluated for compliance. The site inspections of the facilities and the review of their associated DMRs are companion activities used to determine significant violations for enforcement action. The review of four to twelve DMRs for each site inspected facility does not make DMR review the primary compliance activity for MDE's NPDES/CWA program.

The last sentence in the second paragraph refers to a general statement in the front of the 2008 Annual Report (not 2009) that describes the inspection measures in the Report. That statement does not appear in any other Annual Report in the 10-year period and is not in the 2009 Annual Report. That general statement was not applicable in 2008 or any other year for the reasons noted above to the NPDES/CWA program.



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Ms. Shana Jones, Executive Director  
Page Two  
March 31, 2010

With regard to your second observation related to citizen suits, it is correct that we do not currently have a written policy related to citizen suits. That does not, however, mean that we can't provide factual information about the number of suits and our response to each. Since January of 2007, MDE has received the four citizen suit notices listed below:

- 1) NOI re: Sparrow's Point site, Baltimore/ no subsequent MDE action in federal court;
- 2) NOI re: Mirant Chalk Point Facility/ no subsequent MDE action in federal court to date;
- 3) NOI re: Hudson Farm/ no subsequent action in federal court, MDE pursued administrative action which does not preclude citizen suit; and
- 4) NOI re: Velsicol, Kent County/MDE subsequent action in State court.

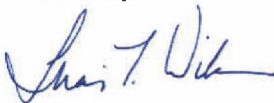
The Department is also providing information on the following three additional "citizen actions" to avoid any further confusion. These "citizen actions" are requests made directly to EPA, as opposed to the types of Notices listed above which are the subject of your report. All three actions are pending Clean Air Act Title V permit petitions filed directly with EPA.

Finally, there is also a mandamus action filed against MDE in State circuit court regarding a Title V permit that was originally initiated with a Citizen's Notice of Intent to Sue. MDE did not take legal action in response to that Notice of Intent to Sue.

While your letter notes complaints you have heard, I respectfully request that you review these facts.

Again, we appreciate the opportunity to clarify these points. If you would like to discuss this further, please contact me or Sue Battle-McDonald, MDEStat Director, at 410-537-4111 or [sbattle-mcdonald@mde.state.md.us](mailto:sbattle-mcdonald@mde.state.md.us).

Sincerely,



Shari T. Wilson  
Secretary

cc: Robert L. Glicksman, Member Scholar and Board Member, Center for Progressive Reform  
Yee Huang, Policy Analyst, Center for Progressive Reform  
Bob Summers, Deputy Secretary  
Sue Battle-McDonald, MDEStat Director  
Jay Sakai, Director, Water Management Administration  
Jack Bowen, Water Management Administration



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